

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,)
) CR-18-00258-EJD
 PLAINTIFF,)
) SAN JOSE, CALIFORNIA
 VS.)
) JULY 7, 2021
 ELIZABETH A. HOLMES,)
) PAGES 1 - 79
 DEFENDANT.)
 _____)
)

TRANSCRIPT OF ZOOM PROCEEDINGS
BEFORE THE HONORABLE EDWARD J. DAVILA
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: UNITED STATES ATTORNEY'S OFFICE
BY: JOHN C. BOSTIC
JEFFREY B. SCHENK
150 ALMADEN BOULEVARD, SUITE 900
SAN JOSE, CALIFORNIA 95113

BY: ROBERT S. LEACH
KELLY VOLKAR
1301 CLAY STREET, SUITE 340S
OAKLAND, CALIFORNIA 94612

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER:

IRENE L. RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

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A P P E A R A N C E S: (CONT'D)

FOR DEFENDANT HOLMES: WILLIAMS & CONNOLLY LLP
BY: KEVIN M. DOWNEY
LANCE A. WADE
KATHERINE TREFZ
AMY SAHARIA
RICHARD CLEARY
725 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20005

LAW OFFICE OF JOHN D. CLINE
BY: JOHN D. CLINE
ONE EMBARCADERO CENTER, SUITE 500
SAN FRANCISCO, CALIFORNIA 94111

1 SAN JOSE, CALIFORNIA

JULY 7, 2021

2 P R O C E E D I N G S

10:10AM 3 (COURT CONVENED AT 10:10 A.M.)

10:10AM 4 THE COURT: THANK YOU. GOOD MORNING EVERYONE.

10:10AM 5 LET'S CALL OUR MORNING MATTER. THIS IS 18-258,

10:10AM 6 UNITED STATES VERSUS ELIZABETH HOLMES.

10:10AM 7 LET ME FIRST GET APPEARANCES OF THE PARTIES, PLEASE.

10:10AM 8 WHO APPEARS FOR THE GOVERNMENT TODAY?

10:10AM 9 MR. BOSTIC: GOOD MORNING, YOUR HONOR.

10:10AM 10 JOHN BOSTIC FOR THE UNITED STATES ALONG WITH ROBERT LEACH,
10:10AM 11 JEFF SCHENK, AND KELLY VOLKAR.

10:10AM 12 THE COURT: THANK YOU. GOOD MORNING EVERYONE.

10:10AM 13 WHO APPEARS FOR THE DEFENDANT?

10:10AM 14 MS. SAHARIA: GOOD MORNING, YOUR HONOR.

10:11AM 15 THIS IS AMY SAHARIA FOR MS. HOLMES. WITH ME IS
10:11AM 16 KEVIN DOWNEY, LANCE WADE, KATHERINE TREFZ, JOHN CLINE.

10:11AM 17 I WILL NOTE THAT MY COLLEAGUE, RICH CLEARY, IS HERE IN
10:11AM 18 THIS ROOM WITH ME BUT IS NOT APPEARING ON VIDEO.

10:11AM 19 AND MS. HOLMES IS PRESENT. I SEE HER ON THE SCREEN.

10:11AM 20 WE DO HAVE A MECHANISM FOR COMMUNICATING WITH HER IF NEED
10:11AM 21 BE, AND SHE DOES CONSENT TO PROCEEDING REMOTELY TODAY.

10:11AM 22 THE COURT: THANK YOU. THANK YOU FOR THAT. GOOD
10:11AM 23 MORNING EVERYONE.

10:11AM 24 THIS IS THE DATE AND TIME THAT WAS SET FOR THE MOTION.
10:11AM 25 THIS INVOLVES DOCKETS 810. IT'S PLAINTIFF'S -- EXCUSE ME --

10:11AM 1 ELIZABETH HOLMES'S MOTION TO SUPPRESS EVIDENCE. THERE'S AN
10:11AM 2 OPPOSITION AT 846 AND A REPLY AT 850. THESE ARE ALL DOCKETS.
10:11AM 3 I HAVE READ AND REVIEWED ALL OF THOSE DOCKETS, THE ATTACHMENTS
10:12AM 4 AND REFERENCES THERETO.

10:12AM 5 ARE THERE ANY OTHER DOCUMENTS THAT COUNSEL WISH TO DRAW TO
10:12AM 6 MY ATTENTION BEFORE WE GO FURTHER?

10:12AM 7 ANYTHING?

10:12AM 8 MS. SAHARIA: NO, YOUR HONOR.

10:12AM 9 I WOULD JUST NOTE THAT OUR MOTION DOES CROSS-REFERENCE OUR
10:12AM 10 REPLY BRIEF IN SUPPORT OF OUR MOTION IN LIMINE TO EXCLUDE
10:12AM 11 ANECDOTAL EVIDENCE AND THE EXHIBITS ATTACHED TO THAT REPLY
10:12AM 12 BRIEF, AND SOME OF THOSE EXHIBITS MAY BE REFERENCED TODAY AS
10:12AM 13 WELL.

10:12AM 14 THE COURT: ALL RIGHT. THANK YOU.

10:12AM 15 MR. BOSTIC: NO ADDITIONAL FILINGS FROM THE
10:12AM 16 GOVERNMENT. THANK YOU, YOUR HONOR.

10:12AM 17 THE COURT: THANK YOU.

10:12AM 18 SO THIS IS A MOTION TO SUPPRESS FILED. THE FIRST THING I
10:12AM 19 WANTED TO ASK IS ARE WE PAST THE DEADLINE TO FILE RULE 12
10:12AM 20 MOTIONS TO SUPPRESS? HAS THAT COME AND GONE?

10:12AM 21 WHO WANTS TO ANSWER THAT? MR. BOSTIC?

10:12AM 22 MS. SAHARIA: SO, YOUR HONOR --

10:12AM 23 THE COURT: OH, YES, MS. SAHARIA. YES. THANK YOU.

10:12AM 24 MS. SAHARIA: YES. I'LL TAKE THAT.

10:12AM 25 SO, YOUR HONOR, THE DEADLINE FOR RULE 12 MOTIONS WAS IN

1 AUGUST OF 2020, BUT THAT MOTION -- THE DEADLINE FOR FILING
2 RULE 12 MOTIONS APPLIES ONLY WHEN THE MOTION IS REASONABLY
3 AVAILABLE AT THE TIME. THIS MOTION WAS NOT REASONABLY
4 AVAILABLE AT THE TIME BECAUSE THE EVIDENCE ON WHICH IT IS BASED
5 WAS NOT AVAILABLE TO THE DEFENSE OR PRODUCED AT THAT TIME.

6 THE GOVERNMENT FIRST PRODUCED ITS BRADY LETTER DISCLOSING
7 ITS RULE IN THE LOSS OF LIS ONLY IN OCTOBER OF 2020 AND MUCH OF
8 THE EVIDENCE ON WHICH THE MOTION IS BASED HAS BEEN TRICKLED OUT
9 FROM THE GOVERNMENT IN THE MONTHS SINCE THEN.

10 JUST TO GIVE ONE EXAMPLE, OR TWO EXAMPLES. WE LITIGATED
11 THE MOTION TO EXCLUDE ANECDOTAL TEST RESULTS AT A TIME WHEN THE
12 GOVERNMENT WAS WITHHOLDING SIGNIFICANT EVIDENCE RELATED TO ITS
13 ROLE IN THE LOSS OF THE LIS DATABASE, WHICH IS WHY THE
14 GOVERNMENT ITSELF WAS FORCED TO CONSENT TO OUR EXTENSION OF
15 TIME TO FILE A REPLY BRIEF GIVEN ITS LATE PRODUCTION OF
16 INFORMATION RELATED TO THESE EVENTS.

17 JUST AS ANOTHER EXAMPLE, THE GOVERNMENT MADE ANOTHER
18 PRODUCTION RELEVANT TO THIS MOTION ONLY IN MARCH OF THIS YEAR,
19 ON MARCH 30TH, AND I WOULD NOTE THAT SOME OF THOSE DOCUMENTS
20 HAVE BEEN IN THE GOVERNMENT'S POSSESSION SINCE DECEMBER.

21 SO WHILE WE WERE LITIGATING THE REPLY BRIEF AND
22 SUPPORTIVE -- OR THE ANECDOTAL EVIDENCE MOTION, THE GOVERNMENT
23 WAS WITHHOLDING DOCUMENTS RELEVANT TO THESE ISSUES.

24 SO WE THINK THIS MOTION WAS NOT REASONABLY AVAILABLE BACK
25 IN AUGUST OF 2020. EVEN IF IT WAS, WE THINK THESE EVENTS

10:14AM 1 SURELY CONSTITUTE GOOD CAUSE FOR FILING THE MOTION NOW. AND AS
10:14AM 2 YOU KNOW, YOUR HONOR, WE MOVED TO EXCLUDE THE GOVERNMENT'S
10:14AM 3 ANECDOTAL EVIDENCE UNDER THE RULES OF EVIDENCE.

10:15AM 4 THE COURT RULED ON THAT MOTION ONLY IN MAY FOLLOWING THE
10:15AM 5 MAY HEARING. WE DID PREVIEW, AS WE WERE LITIGATING THOSE
10:15AM 6 ISSUES, THAT IF THIS EVIDENCE WERE TO BE DEEMED RELEVANT, THAT
10:15AM 7 WOULD RAISE DUE PROCESS CONCERNS. THOSE DUE PROCESS CONCERNS
10:15AM 8 ARE NOW RIPE, WHICH IS WHY WE FILED THE MOTION NOW.

10:15AM 9 AND JUST AS A FINAL POINT ON THIS, YOUR HONOR, THE
10:15AM 10 GOVERNMENT CLAIMS THAT THE MOTION IS UNTIMELY ONLY IN A
10:15AM 11 FOOTNOTE OF THEIR BRIEF. I THINK IT'S WELL ESTABLISHED THAT
10:15AM 12 FOOTNOTES ARE NOT SUFFICIENT TO PRESERVE AN ISSUE, AND I THINK
10:15AM 13 IF THE GOVERNMENT REALLY THOUGHT THE MOTION WAS UNTIMELY, YOU
10:15AM 14 WOULD EXPECT THAT ARGUMENT TO BE FULLY PRESENTED TO THE COURT,
10:15AM 15 WHICH IT WAS NOT.

10:15AM 16 THE COURT: ALL RIGHT. THANK YOU.

10:15AM 17 MR. BOSTIC, DO YOU WISH TO BE HEARD?

10:15AM 18 MR. BOSTIC: YES, YOUR HONOR. THANK YOU. JUST
10:15AM 19 BRIEFLY.

10:15AM 20 ON THE LAST POINT, THE GOVERNMENT CHOSE TO MEET THIS
10:15AM 21 MOTION ON THE MERITS BECAUSE I THINK, AS WE'LL SEE SHORTLY, THE
10:15AM 22 GOVERNMENT HAS THE STRONGER ARGUMENT ON THE LAW AND THE FACTS,
10:15AM 23 BUT ON THE PROCEDURAL POINT, THE GOVERNMENT DOESN'T AGREE THAT
10:16AM 24 THIS MOTION IS TIMELY.

10:16AM 25 THE KEY FACTS THAT WOULD HAVE PUT THE DEFENSE ON NOTICE OF

10:16AM 1 THE CAUSE FOR BRINGING THIS MOTION OR WOULD HAVE LED THE
10:16AM 2 DEFENSE TO KNOW THAT SUCH A MOTION WAS POSSIBLE OR COLORABLE
10:16AM 3 WERE KNOWN TO THE DEFENSE LONG BEFORE THIS MOTION WAS FILED.

10:16AM 4 THE GOVERNMENT HAS CONTINUED TO COLLECT EVIDENCE RELEVANT
10:16AM 5 TO THESE ISSUES AS PART OF ITS ONGOING INVESTIGATION AND HAS
10:16AM 6 PRODUCED THOSE MATERIALS, SOME OF THEM SUBSEQUENT TO THE MOTION
10:16AM 7 FILING DEADLINE FOR WHICH RULE 12 MOTIONS, BUT THE KEY FACTS
10:16AM 8 THE GOVERNMENT CONTENDS WERE KNOWN TO THE DEFENSE LONG BEFORE.
10:16AM 9 THE GOVERNMENT ALSO DISAGREES WITH THE ARGUMENT THAT THE
10:16AM 10 COURT'S MOTION IN LIMINE RULING SOMEHOW RIPENED THIS MOTION.

10:16AM 11 THESE ARGUMENTS COULD HAVE BEEN BROUGHT IN PARALLEL TO OR
10:16AM 12 PREVIOUS TO THE COURT'S MOTION IN LIMINE ADJUDICATIONS.

10:16AM 13 THE COURT: ALL RIGHT. THANK YOU VERY MUCH. THANK
10:16AM 14 YOU FOR THAT. I WANT TO GET CLARIFICATION OF THE PARTY'S
10:16AM 15 POSITIONS ON THAT.

10:17AM 16 AND BECAUSE WE ARE ALL HERE, I THINK WE SHOULD GO FORWARD
10:17AM 17 WITH THIS MOTION. LET ME JUST TELL YOU, I'VE READ YOUR
10:17AM 18 PLEADINGS, AND I APPRECIATE YOUR AUGMENTATION OF THOSE TODAY.

10:17AM 19 MY INTENT IS TO LISTEN TO WHAT YOU HAVE TO SAY AND MOST
10:17AM 20 LIKELY WE'LL TAKE THE MOTION UNDER SUBMISSION AND YOU'LL GET AN
10:17AM 21 ORDER OUT SHORTLY THEREAFTER.

10:17AM 22 SO LET ME START THEN. MS. SAHARIA, ARE YOU SPEAKING ON
10:17AM 23 THE MOTION?

10:17AM 24 MS. SAHARIA: YES, I AM, YOUR HONOR.

10:17AM 25 THE COURT: ALL RIGHT. THANK YOU. WHAT WOULD YOU

10:17AM 1 LIKE ME TO KNOW?

10:17AM 2 MS. SAHARIA: YOUR HONOR, LET ME COVER I THINK FOUR
10:17AM 3 TOPICS IN THIS PRESENTATION. I'LL START WITH JUST A FEW
10:17AM 4 INTRODUCTORY REMARKS ABOUT THE MOTION TO PUT THE REST IN
10:17AM 5 FRAMING. I'LL TOUCH ON A FEW OF THE LEGAL ISSUES THAT I THINK
10:17AM 6 ARISE OUT OF THE PARTY'S BRIEFS, AND THEN I WANT TO SPEND THE
10:17AM 7 BULK OF THE ARGUMENT ON WHAT WE THINK ARE THE KEY DISPUTED
10:17AM 8 FACTS THAT REQUIRE A HEARING, AND THEN I'LL JUST TOUCH AT THE
10:18AM 9 VERY END ON THE MOTION TO COMPEL THAT ACCOMPANIES THE MOTION TO
10:18AM 10 SUPPRESS.

10:18AM 11 SO JUST TO BEGIN, I JUST WANT TO MAKE CLEAR THAT AT THIS
10:18AM 12 JUNCTION THE QUESTION BEFORE THE COURT IS SIMPLY WHETHER TO
10:18AM 13 HOLD AN EVIDENTIARY HEARING. WE DO THINK THAT THE CURRENT
10:18AM 14 RECORD SUFFICES TO REQUIRE SUPPRESSION, BUT THE COURT NEED NOT
10:18AM 15 MAKE THAT DECISION TODAY OR IN DECIDING THE MOTION AS IT
10:18AM 16 CURRENTLY STANDS.

10:18AM 17 THE COURT NEED ONLY HOLD FOR PRESENT PURPOSES THAT THE
10:18AM 18 MOTION RAISES AN ISSUE OF FACT, OF DISPUTED FACTS RELATED TO
10:18AM 19 WHETHER TO SUPPRESS EVIDENCE OR WHETHER TO IMPOSE SOME SORT OF
10:18AM 20 SANCTION FOR THE LOSS OF THIS EVIDENCE, AND THEN PROCEED TO
10:18AM 21 HOLD A HEARING AT WHICH POINT THE COURT CAN THEN MAKE ITS FINAL
10:18AM 22 DECISION BASED ON THE FULL RECORD DEVELOPED AT THAT HEARING.

10:18AM 23 THE QUESTION WITH RESPECT TO WHETHER TO HOLD A HEARING IS
10:18AM 24 WHETHER WE HAVE ALLEGED FACTS WITH SUFFICIENT DEFINITENESS,
10:18AM 25 CLARITY, AND SPECIFICITY TO ENABLE THE COURT TO DETERMINE THAT

1 CONTESTED ISSUES OF FACT EXIST, AND WE SUBMIT THAT WE HAVE MET
2 THAT REQUIREMENT EASILY WITH RESPECT TO BOTH OF THE LEGAL
3 THEORIES THAT ARE PRESENTED IN THE MOTION.

4 AS YOUR HONOR I'M SURE IS AWARE, THE MOTION PRESENTS TWO
5 DIFFERENT THEORIES FOR SUPPRESSING EVIDENCE OR FOR IMPOSING
6 SOME SORT OF SANCTION IN CASES OF LOSS OF EVIDENCE. THE HIGHER
7 STANDARD IS THE DUE PROCESS STANDARD.

8 BUT IN THE NINTH CIRCUIT THERE IS A LESSER STANDARD, THE
9 LOUD HAWK STANDARD, THAT REQUIRES SANCTIONS IN CASES OF
10 GOVERNMENT LOSS OF EVIDENCE AND PURSUANT TO A BALANCING TEST,
11 AND THAT IS -- THAT STANDARD GOVERNS LESSER SANCTIONS SUCH AS
12 SUPPRESSION AND IT IS A LESSER STANDARD.

13 SO AT THIS POINT THE COURT NEED ONLY CONCLUDE THAT THERE
14 ARE DISPUTED ISSUES OF FACT THAT GO TO THAT BALANCING TEST TO
15 PROCEED FORWARD TO A HEARING AT WHICH POINT WE EXPECT THE
16 RECORD WILL SHOW THAT WE ARE ENTITLED TO SUPPRESSION OR OTHER
17 SANCTIONS BOTH UNDER LOUD HAWK AND UNDER THE DUE PROCESS
18 CLAUSE.

19 NOW, THE STANDARD FOR HOLDING A HEARING IS NOT TERRIBLY
20 DEMANDING. THE COURT -- THE GOVERNMENT HAS CITED TO THE COURT
21 A NUMBER OF CASES IN WHICH COURTS HAVE DENIED SUPPRESSION AND
22 CASES OF FAILURE TO COLLECT OR PRESERVE EVIDENCE, BUT I WOULD
23 NOTE THAT IN MANY OF THOSE CASES THE COURT DID HOLD AN
24 EVIDENTIARY HEARING AND CONCLUDED THAT SUPPRESSION WAS NOT
25 REQUIRED ONLY BASED ON THE FACTS THAT WERE DEVELOPED AT THAT

1 HEARING. THOSE CASES INCLUDE LOUD HAWK, ROBERTSON, GIBSON,
2 BROWN, AND HINKSON. IN ALL OF THOSE CASES THE COURT DID HOLD A
3 HEARING.

4 NOW, WE SUBMIT THAT THIS CASE IS FUNDAMENTALLY DIFFERENT
5 FROM THE CASES ON WHICH THE GOVERNMENT IS RELYING. THE TYPICAL
6 CASE WHERE SUPPRESSION IS DENIED IS A CASE WHERE AN AGENT OUT
7 IN THE FIELD FAILS TO COLLECT EVIDENCE SUCH AS, LET'S SAY, A
8 BLOOD SAMPLE IN ORDER TO SUBJECT IT TO TESTS HAVING NO REASON
9 TO BELIEVE AT THE TIME THAT THOSE TESTS WOULD HAVE ANY
10 EXCULPATORY VALUE TO THE DEFENDANT.

11 AND IN A TYPICAL CASE WHERE SUPPRESSION IS DENIED, THE
12 AGENT WAS TYPICALLY FOLLOWING ROUTINE GOVERNMENT PROCEDURES IN
13 DECIDING NOT TO COLLECT THAT EVIDENCE, OR MAYBE AT WORST IT WAS
14 A MERE OVERSIGHT BY WHICH THAT EVIDENCE WAS NOT COLLECTED.

15 I THINK IT'S CLEAR FROM THE RECORD THAT THIS IS NOT THAT
16 TYPICAL CASE. I WANT TO TALK IN MORE DETAIL ABOUT THE ACTUAL
17 EVIDENCE IN A LITTLE BIT, BUT LET ME JUST START WITH THREE
18 GENERAL OBSERVATIONS ABOUT THIS CASE.

19 FIRST, AT THE TIME OF THE EVENTS IN QUESTION, THE
20 GOVERNMENT UNQUESTIONABLY KNEW THAT AT THE LIS DATABASE WAS THE
21 MOST RELIABLE AND COMPREHENSIVE SET OF INFORMATION ABOUT
22 THERANOS'S TEST RESULTS, AND IT KNEW THAT THAT DATABASE HAD
23 EXCULPATORY VALUE GOING TO A CENTRAL ISSUE IN THE CASE.

24 SECOND, THE LOSS OF THE EVIDENCE IS NOT THE RESULT OF
25 STANDARD GOVERNMENT PROCEDURES OR EVEN OVERSIGHT. THE

1 GOVERNMENT'S CONDUCT IN THIS CASE WAS SO UNUSUAL THAT IT FELT
2 COMPELLED TO WRITE A 23-PAGE BRADY LETTER TO THE DEFENSE
3 DESCRIBING ITS FAILURE TO PRESERVE THE LIS.

4 THE EVIDENCE TO DATE, WHICH TODAY IS STILL INCOMPLETE, BUT
5 THE EVIDENCE TO DATE SUGGESTS THAT PROSECUTORS, THE PROSECUTORS
6 PROSECUTING THIS CASE REPEATEDLY DISREGARDED ADVICE FROM THEIR
7 OWN SUPPORT STAFF REGARDING STEPS THAT THEY SHOULD TAKE TO
8 ACCESS AND PRESERVE THE LIS DATABASE.

9 THE COURT: MS. SAHARIA, AT THE TIME THAT THEY
10 DISREGARDED, ACCORDING TO THE DOCUMENTS THAT I'VE READ, AT THE
11 TIME THAT THEY DISREGARDED THE ADVICE OF THEIR EXPERTS AS YOU
12 SUGGEST, THE LIS WAS DESTROYED, WASN'T IT?

13 MS. SAHARIA: WELL, NOT EXACTLY, YOUR HONOR.

14 I THINK IT'S IMPORTANT TO KEEP IN MIND THAT THERE'S REALLY
15 TWO SOURCES OF DATA THAT ARE RELEVANT TO THIS DISCUSSION.
16 THERE IS THE LIS DATABASE.

17 THE COURT: SURE. WELL, LET ME TELL YOU WHAT I'M
18 TALKING ABOUT SO YOU UNDERSTAND.

19 MS. SAHARIA: SURE.

20 THE COURT: SO AS I UNDERSTAND IT THE LIS WAS
21 CREATED, AND MAYBE WE'LL TALK A LITTLE BIT MORE ABOUT THE
22 GENESIS OF THAT CREATION, BUT IT WAS CREATED. IT CONTAINED ALL
23 OF THIS INFORMATION. IT WAS IN THE CUSTODIAL POSSESSION OF
24 THERANOS. THEY HAD IT ON SIGHT, OR SOMEWHERE, THE SERVERS WERE
25 THERE, AND THEN AT THE DEMISE OF THERANOS THE -- I SUPPOSE IT

10:23AM 1 WAS GOING TO BE DECONSTRUCTED, THAT IS, THE SERVERS. IT SOUNDS
10:23AM 2 LIKE THE SERVERS MAY HAVE BEEN LEASED OR SOMETHING, BUT THEY
10:23AM 3 WERE TAKEN APART, AND THEY WERE GOING TO BE DECONSTRUCTED SUCH
10:23AM 4 THAT THE LIS AS IT EXISTED WOULD NO LONGER EXIST AND IT'S A
10:23AM 5 FIRST ITERATION SHALL I SAY.

10:24AM 6 MS. SAHARIA: SURE. SO LET ME --

10:24AM 7 THE COURT: SO DIDN'T A COPY OF THAT, WHEN THE
10:24AM 8 GOVERNMENT RECEIVED A COPY IN AUGUST -- I THINK IT WAS AUGUST
10:24AM 9 27TH, WAS IT? IS THAT WHEN THEY RECEIVED THEIR COPY?

10:24AM 10 MS. SAHARIA: YES, YOUR HONOR, IT WAS IN AUGUST OF
10:24AM 11 2018.

10:24AM 12 THE COURT: YES.

10:24AM 13 AND THEN FOUR DAYS LATER THERANOS CAUSED THE DEMISE OF THE
10:24AM 14 SERVERS, AND WHOEVER WAS IN CHARGE CAUSED THE DEMISE OF THE
10:24AM 15 SERVERS SUCH THAT THEY DID MAKE A COPY OF IT, AND THEY SENT IT
10:24AM 16 TO THE GOVERNMENT.

10:24AM 17 AND THEN FOUR DAYS LATER IT WAS DESTROYED, IF YOU WILL.
10:24AM 18 IT WAS DECOMMISSIONED I GUESS IS THE WORD, AND THE GOVERNMENT
10:24AM 19 DID NOT DECOMMISSION IT. THE GOVERNMENT DIDN'T REQUEST IT TO
10:24AM 20 BE DECOMMISSIONED. THAT WAS A UNILATERAL DECISION THAT WAS
10:24AM 21 MADE BY THERANOS.

10:24AM 22 AS I UNDERSTAND IT FROM THE DOCUMENTS I'VE READ, THAT THAT
10:24AM 23 DATE, THAT DECOMMISSIONING DATE WAS NOT PROVIDED TO THE
10:24AM 24 GOVERNMENT AT THE TIME THAT THE GOVERNMENT RECEIVED THE
10:25AM 25 DATABASE FROM THERANOS. THAT'S WHAT I UNDERSTAND AT LEAST FROM

10:25AM 1 THE DOCUMENTS THAT YOU FILED.

10:25AM 2 I DON'T THINK YOU QUARREL WITH THE FACT THAT THE
10:25AM 3 GOVERNMENT DID NOT DESTROY THIS OR DECOMMISSION. THAT WAS DONE
10:25AM 4 BY WHOEVER WAS IN CHARGE OF THERANOS.

10:25AM 5 AND I DON'T THINK YOU QUARRELLED WITH THE FACT THAT THE
10:25AM 6 GOVERNMENT WAS NOT GIVEN NOTICE OF THE DECOMMISSION DATE. I
10:25AM 7 DON'T THINK YOU QUARREL WITH THAT.

10:25AM 8 THEN THE OTHER QUESTION I HAD IS APPARENTLY WHEN THE
10:25AM 9 GOVERNMENT RECEIVED WHAT THEY THOUGHT WAS A MIRROR IMAGE OF THE
10:25AM 10 DATABASE, THEY WERE NOT TOLD THAT A MISSING KEY, I GUESS THEY
10:25AM 11 CALL IT, TO ACCESS THE DATABASE WAS MISSING.

10:25AM 12 THEY WERE GIVEN A PASSWORD, AN ENCRYPTED PASSWORD THAT
10:25AM 13 WOULD ALLOW THEM TO OPEN THE DATABASE, BUT AT THE TIME THAT IT
10:25AM 14 WAS DELIVERED FROM THE LAWYERS, THE LAWYERS KNEW THAT THERE WAS
10:26AM 15 A KEY THAT WOULD NEED TO BE USED TO ACCESS THE MATERIAL. THAT
10:26AM 16 WAS NOT PROVIDED IN THE DATABASE THAT WAS GIVEN TO THE
10:26AM 17 GOVERNMENT.

10:26AM 18 AND SO THE GOVERNMENT -- IN ESSENCE WHAT THEY WERE GIVEN
10:26AM 19 WAS A NONWORKING COPY, IF YOU WILL, OF THE DATABASE. IN OTHER
10:26AM 20 WORDS, THEY COULDN'T ACCESS IT. EVEN IF THEY HAD TRIED TO
10:26AM 21 ACCESS IT IN THE PARKING LOT ONCE THEY RECEIVED IT, THEY
10:26AM 22 WOULDN'T HAVE BEEN ABLE TO.

10:26AM 23 IS THAT THE STATE OF THINGS?

10:26AM 24 MS. SAHARIA: WELL, I, I, I -- SOME OF THAT IS
10:26AM 25 CORRECT, YOUR HONOR, BUT I THINK THERE ARE INFERENCES DRAWN

1 FROM THOSE FACTS THAT REQUIRE AN EVIDENTIARY HEARING.

2 SO LET ME TAKE THOSE TWO PIECES OF FACTS IN TURN. ONE,
3 THE LIS SERVER, THE PHYSICAL SERVER; AND THEN, TWO, THE COPY OF
4 THE LIS.

5 SO WITH RESPECT TO THE LIS SERVER, YES, YOUR HONOR IS
6 CORRECT THAT THE SERVER -- I DON'T THINK THE CORRECT WORD IS
7 DESTROYED. IT'S NOT AS THOUGH SOMEONE TOOK A HAMMER TO THE
8 SERVER AND, YOU KNOW, CRUSHED IT TO PIECES OUT IN THE PARKING
9 LOT.

10 THE GOVERNMENT KNEW FULL KNOW THAT THERANOS WAS CLOSING,
11 IT WAS PHYSICALLY CLOSING ITS OFFICE BUILDING, AND WHEN A
12 BUILDING CLOSES, THAT REQUIRES TAKING THE THINGS IN THE
13 BUILDING AND MOVING THEM.

14 WHAT THE GOVERNMENT APPRECIATED ABOUT WHAT THAT MEANT FOR
15 THE PHYSICAL LIS SERVER WOULD BE AN ISSUE TO EXPLORE AT THE
16 HEARING, BUT IT'S UNDISPUTED THE GOVERNMENT WAS FULL AWARE THAT
17 THERANOS WAS CLOSING AND YET IT WAITED A YEAR AND A HALF UNTIL
18 THE EVE OF THE COMPANY CLOSING TO REQUEST THE DATABASE.

19 THE COURT: WELL, THERE WERE NEGOTIATIONS, WEREN'T
20 THERE? WASN'T THE GOVERNMENT AND LAWYERS FOR THERANOS IN
21 NEGOTIATION ABOUT -- I MEAN, THERE WAS A TROVE OF EVIDENCE THAT
22 WAS BEING SOUGHT NOT ONLY FROM -- WHEN I SAY "THE GOVERNMENT" I
23 MEAN THIS PROSECUTION.

24 BUT THERE WAS ALSO LETTERS AND DOCUMENTATION FROM THE
25 S.E.C. AND SUBPOENAS FROM THE S.E.C. EARLIER. WAS IT IN 2016

10:28AM 1 PERHAPS? '15? THERE WERE SUBPOENAS THAT WERE REQUESTING -- IT
10:28AM 2 SEEMED LIKE THE SAME TYPE OF INFORMATION WHEN WE LOOK AT THE
10:28AM 3 SUBPOENAS. THEY TALK ABOUT -- THE S.E.C. SUBPOENAS TALK ABOUT
10:28AM 4 ALL THE INFORMATION REGARDING -- INFORMATION THAT COULD BE ON
10:28AM 5 THE LIS I SUPPOSE.

10:28AM 6 BUT IN ANY EVENT, THERE WERE NEGOTIATIONS BETWEEN THE
10:28AM 7 PROSECUTION, THE GOVERNMENT PROSECUTION IN THIS CASE AND THE
10:28AM 8 ATTORNEYS FOR THERANOS ABOUT RECEIVING INFORMATION. WASN'T
10:28AM 9 THAT ONGOING?

10:28AM 10 MS. SAHARIA: WELL, TO BE SURE, THE GOVERNMENT WAS
10:28AM 11 REQUESTING CERTAIN SUBSETS OF DATA THAT RESIDED IN THE LIS, BUT
10:28AM 12 THE FIRST TIME THAT THE GOVERNMENT SUBPOENAED THE LIS DATABASE
10:28AM 13 ITSELF WITH THE FULL ARRAY OF INFORMATION IN THE DATABASE WAS
10:28AM 14 ON JUNE 14TH, 2018, WHICH WAS ONLY TWO WEEKS BEFORE IT RETURNED
10:29AM 15 THE INDICTMENT IN THIS CASE AND AT A TIME WHEN IT KNEW FULL
10:29AM 16 WELL THAT THERANOS WAS ABOUT TO CLOSE.

10:29AM 17 THE COURT: WELL, IT WAS JUNE 4TH.

10:29AM 18 WAS IT JUNE 4TH AND THEN THE INDICTMENT WAS JUNE 14TH? I
10:29AM 19 CAN'T REMEMBER THE DATES, BUT IT WAS AROUND THAT SAME TIME
10:29AM 20 PERIOD. I THINK YOU'RE CORRECT.

10:29AM 21 MS. SAHARIA: YES. I THINK IT WAS JUNE 4TH AND
10:29AM 22 JUNE 18TH, BUT IT'S AROUND THOSE PRECISE DATES, YOUR HONOR.

10:29AM 23 THE COURT: RIGHT.

10:29AM 24 MS. SAHARIA: WITH RESPECT TO THE DATABASE ITSELF,
10:29AM 25 IT IS CERTAINLY TRUE THAT WHEN THE COMPANY CLOSED, IT HAD NO

1 CHOICE BUT TO MOVE THE PHYSICAL SERVERS TO A DIFFERENT
2 LOCATION. MY UNDERSTANDING IS I THINK THEY WERE INITIALLY
3 TRANSFERRED TO THE ASSIGNEE AND THEN AT SOME POINT RETURNED TO
4 THE LESSOR OF THAT EQUIPMENT.

5 AND IT IS, I THINK, CORRECT THAT ONCE THAT PHYSICAL MOVING
6 OF THE SERVERS OCCURRED, BECAUSE THEY HAD TO BE, YOU KNOW,
7 DISCONNECTED FROM EACH OTHER, THAT IS WHAT THE GOVERNMENT
8 CALLED THE DECOMMISSIONING OF THE LIS DATABASE.

9 BUT THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD FROM
10 WITNESSES THAT THE GOVERNMENT HAS INTERVIEWED AND THESE ARE
11 AT -- LET ME MAKE SURE THAT I GIVE THE COURT THE CORRECT
12 EXHIBIT NUMBERS, THESE ARE -- HOLD ON. THESE ARE DEFENSE
13 EXHIBITS 10, 11, AND 13, WITNESSES HAVE SAID THAT IT WOULD HAVE
14 CERTAINLY HAVE BEEN POSSIBLE TO RECONSTRUCT THE DATABASE USING
15 THE PHYSICAL SERVERS WITH SOME AMOUNT OF EFFORT. PERHAPS OVER
16 A MONTH IT COULD HAVE BEEN RECONSTRUCTED USING THE PHYSICAL
17 EQUIPMENT. THAT IS ONE OF THE AVENUES THAT THE GOVERNMENT
18 SUPPORT STAFF RECOMMENDED TO THE GOVERNMENT, THAT IT ACTUALLY
19 SEIZE THE PHYSICAL SERVERS AND USE THE PHYSICAL SERVERS TO GET
20 ACCESS TO THE LIS DATA. THAT IS SOMETHING THAT THE GOVERNMENT
21 WAS DOING IN FACT. BEFORE THERANOS CLOSED, IT ROLLED UP THE
22 TRUCKS TO THE COMPANY'S PHYSICAL LOCATION AND TOOK OTHER
23 PHYSICAL EQUIPMENT FROM THERANOS, BUT IT DIDN'T DO THAT FOR THE
24 LIS DATABASE.

25 THE COURT: AND THAT'S BECAUSE IT SEEMED LIKE FROM

1 THE RECORD IN SOME OF THE DOCUMENTATION THAT THERE WERE ONGOING
2 NEGOTIATIONS BETWEEN COUNSEL FOR THERANOS AND THE GOVERNMENT.
3 THERE WERE EMAILS THAT SUGGESTED -- THIS IS IN THE BRADY
4 LETTER, I THINK, THAT YOU MENTIONED. IT'S PROBABLY
5 EXHIBIT 732-2, PARAGRAPHS 31, 34, 36, SOME OF THOSE PARAGRAPHS
6 IN THERE. PARDON ME, I DON'T HAVE THEM AT MY FINGERTIPS
7 EXACTLY. BUT THEY SUGGEST THAT THERE WAS AN EXCHANGE OF
8 INFORMATION, VERY CORDIAL, BETWEEN THE GOVERNMENT AND I THINK
9 IT WAS WILMER HALE ATTORNEYS WHO WERE IN CHARGE AT THAT TIME OF
10 NEGOTIATING THIS EXCHANGE OF INFORMATION.

11 IT APPEARS THAT SOME OF THESE EMAILS SAID THE TRUCKS WILL
12 BE HERE. WILMER HALE SAID, WE'LL TELL YOU THE SIZE OF WHAT
13 YOU'RE COLLECTING SO YOU CAN ORGANIZE THE RIGHT TRUCKS,
14 CORRECT TRUCKS, AND GET THE RIGHT SIZE OF TRUCKS TO TAKE THINGS
15 AWAY. BUT THERE WAS NEVER DISCUSSION, YOU'RE RIGHT, ABOUT THE
16 SERVERS. THOSE WERE STILL CONNECTED, STILL ONLINE.

17 AND IT SEEMED LIKE CONCURRENT WITH THAT THE CONVERSATION
18 WAS ONGOING WITH THE GOVERNMENT ABOUT HOW TO GET THE LIS.

19 AND THEN ON AUGUST 27TH I THINK THERE WAS AN EMAIL --
20 PARDON ME. LET ME BACKTRACK A MOMENT. I THINK THERE WAS AN
21 EARLIER EMAIL FROM MR. BOSTIC THAT SAID, HEY, I'M JUST CHECKING
22 IN ON WHEN CAN WE GET THE DATABASE? I'M WORKING WITH THERANOS
23 TO GET THAT FOR YOU WAS THE RESPONSE FROM WILMER.

24 AND THEN IT'S READY FOR YOU AUGUST 27TH, COME GET IT.

25 AND THEN FOUR DAYS LATER THEY DECOMMISSION, THEY, SOMEONE.

10:32AM 1 LET ME JUST BE CLEAR, I DON'T KNOW WHO DECOMMISSIONED IT, BUT
10:32AM 2 CAN WE AGREE THAT THE GOVERNMENT DID NOT DECOMMISSION THE
10:32AM 3 DATABASE?

10:32AM 4 MS. SAHARIA: OF COURSE, YOUR HONOR. THE GOVERNMENT
10:32AM 5 WAS NOT THERE AT THERANOS DECONNECTING THE WIRES.

10:33AM 6 THE GOVERNMENT DID KNOW THAT THERANOS WAS CLOSING. AND
10:33AM 7 IT, AND IT, IT DID KNOW THAT, YOU KNOW, RELATIVELY SOON
10:33AM 8 THEREAFTER THAT ITS SUPPORT STAFF WERE RECOMMENDING THAT IT
10:33AM 9 ATTEMPT TO GET THE PHYSICAL HARDWARE, AND IT DIDN'T DO THAT.

10:33AM 10 NOW, LET ME TALK ABOUT THE COPY OF THE LIS THAT WAS
10:33AM 11 PRODUCED TO THE GOVERNMENT ON AUGUST 27TH.

10:33AM 12 THE GOVERNMENT HAS REPRESENTED THAT IT NEEDS -- THAT THAT
10:33AM 13 WAS PRODUCED WITHOUT A PASSWORD AND THAT IT CAN'T ACCESS THE
10:33AM 14 DATABASE WITHOUT A PASSWORD.

10:33AM 15 IT SAYS IN ITS OPPOSITION THAT -- THIS IS AT PAGE 6, THAT
10:33AM 16 ITS EFFORTS TO ACCESS THAT COPY OF THE LIS DATABASE HAVE
10:33AM 17 FAILED, BUT THEY PROVIDE PRECIOUS LITTLE EVIDENCE OF WHAT THOSE
10:33AM 18 EFFORTS ACTUALLY WERE OR IMPORTANTLY WHEN THEY OCCURRED.

10:33AM 19 AND I WILL NOTE THAT UNDER THE LOUD HAWK BALANCING TEST IT
10:34AM 20 IS THE GOVERNMENT'S DUTY TO JUSTIFY THE REASONABLENESS OF ITS
10:34AM 21 CONDUCT AND TO COME FORWARD WITH EVIDENCE JUSTIFYING ITS
10:34AM 22 CONDUCT.

10:34AM 23 AND THE REASON IT HASN'T COME FORWARD WITH THAT EVIDENCE,
10:34AM 24 I WOULD SUBMIT, IS BECAUSE THE ACTUAL EVIDENCE IS QUITE
10:34AM 25 DAMAGING TO THE GOVERNMENT ON THIS POINT. IT RECEIVED THAT

1 COPY OF THE LIS DATABASE AS YOUR HONOR INDICATED IN LATE AUGUST
2 OF 2018 AT A TIME WHEN IT KNEW THAT THE COMPANY WAS ABOUT TO
3 CLOSE.

4 NOW, THE FIRST THING THAT WE ALWAYS DO WHEN WE OBTAIN A
5 PRODUCTION FROM THE GOVERNMENT IS WE OPEN IT AND WE CHECK IT
6 BECAUSE THERE ARE OFTEN TECHNICAL GLITCHES ASSOCIATED WITH
7 PRODUCTIONS, MISSING PASSWORDS, OR DATA THAT IS CORRUPTED OR
8 WHAT HAVE YOU, AND THE REASON FOR THAT IS TO MAKE SURE THAT YOU
9 PROMPTLY CAN CORRECT ANY PROBLEM.

10 THE GOVERNMENT DIDN'T DO THAT. IT TOOK THREE WEEKS TO
11 ACCESS THE HARD DRIVE, EVEN THOUGH THERANOS WAS IMMINENTLY
12 CLOSING. THIS IS AT THE BRADY LETTER WHICH IS EXHIBIT 88 TO
13 OUR ANECDOTAL EVIDENCE REPLY BRIEF, PARAGRAPHS 36 TO 43.

14 AND THEN IT TOOK TWO AND A HALF WEEKS FOR THE SUPPORT
15 PERSONNEL TO RELAY TO THE PROSECUTORS THAT THEY DIDN'T HAVE THE
16 RIGHT SOFTWARE TO PROCESS IT. THAT'S EXHIBIT 88, PARAGRAPH 46.

17 NOW, WILMER HALE HAD TOLD THE GOVERNMENT A MONTH IN
18 ADVANCE WHAT SOFTWARE IT WAS GOING TO NEED TO PROCESS THE
19 DATABASE, AND THERE'S NO EVIDENCE THAT IT ACTED ON THAT
20 INFORMATION.

21 THE COURT: DID WILMER HALE EVER PROVIDE INFORMATION
22 TO THE GOVERNMENT THAT THEY WOULD NEED THE KEY, THE MISSING
23 KEY? WAS THAT EVER GIVEN TO THE GOVERNMENT?

24 MS. SAHARIA: I HAVE NOT SEEN THAT EVIDENCE IN THE
25 RECORD, NOR HAVE I SEEN EVIDENCE THAT THE GOVERNMENT ATTEMPTED

10:35AM 1 TO OPEN THE DATABASE AND REALIZED IT NEEDED A PASSWORD. FOR A
10:36AM 2 YEAR AND A HALF THE FIRST RECORDED ATTEMPT FROM THE GOVERNMENT
10:36AM 3 TO ASK FOR A PASSWORD FOR THE DATABASE OCCURRED IN MARCH OR
10:36AM 4 APRIL OF 2020. THIS IS EXHIBIT 88, AGAIN, THEIR BRADY LETTER,
10:36AM 5 AT PARAGRAPH 52.

10:36AM 6 THE GOVERNMENT DOESN'T INDICATE EXACTLY WHEN THAT
10:36AM 7 OCCURRED. THEY INDICATE THAT THEY REACHED OUT TO WILMER HALE
10:36AM 8 IN MARCH OR APRIL OF 2020. I WOULD SUBMIT IT'S NOT A
10:36AM 9 COINCIDENCE THAT THAT IS THE VERY MOMENT WHEN WE STARTED ASKING
10:36AM 10 THE GOVERNMENT TO SUPPORT ITS ALLEGATIONS IN ITS 404(B) LETTER
10:36AM 11 THAT IT COULD NOT ACCESS THE LIS DATABASE.

10:36AM 12 BUT FOR A YEAR AND A HALF THE GOVERNMENT DID NOTHING WITH
10:36AM 13 THIS COPY OF THE LIS DATABASE SITTING ON A PARALEGAL'S SHELF,
10:36AM 14 AND IF IT HAD ACTED PROMPTLY AS YOU WOULD EXPECT A PROSECUTOR
10:36AM 15 WITH THE MOST CENTRAL EVIDENCE IN THE CASE TO DO, THEY VERY
10:36AM 16 WELL WOULD HAVE FOUND THE PASSWORD. THEY VERY WELL WOULD --

10:37AM 17 THE COURT: THEY WOULD HAVE FOUND THE PASSWORD, THE
10:37AM 18 KEY TO OPEN THIS?

10:37AM 19 MS. SAHARIA: WELL, THEY, THEY, THEY PRESUMABLY --

10:37AM 20 THE COURT: THEY NEVER HAD --

10:37AM 21 MS. SAHARIA: RIGHT, THEY NEVER HAD THAT.

10:37AM 22 BUT THERE WAS EVIDENCE THAT THERE WERE PEOPLE CONNECTED
10:37AM 23 WITH THERANOS WHO MIGHT HAVE HAD THAT KEY IF THE GOVERNMENT HAD
10:37AM 24 PROMPTLY REALIZED THAT IT NEEDED IT.

10:37AM 25 AGAIN, THE SUPPORT STAFF SUGGESTED MULTIPLE THINGS THAT

10:37AM 1 THE GOVERNMENT MIGHT HAVE DONE, WHICH WOULD HAVE, NUMBER ONE,
10:37AM 2 LED IT TO REALIZE THAT IT NEEDED A SECOND PASSWORD TO OPEN THE
10:37AM 3 LIS DATABASE.

10:37AM 4 BUT SECOND OF ALL, WE DON'T KNOW IF THERE ARE OTHER WAYS
10:37AM 5 THAT THE GOVERNMENT COULD HAVE ACCESSED THIS DATABASE, AND
10:37AM 6 THEIR SUPPORT STAFF SUGGESTED THOSE AVENUES TO THEM.

10:37AM 7 FIRST, THEY SUGGESTED THAT THEY CONNECT WITH THE FBI. THE
10:37AM 8 GOVERNMENT HAS ACCESS TO THE MOST SOPHISTICATED COMPUTER
10:37AM 9 EXPERTS IN THE WORLD AT THE FBI. WE ALL KNOW FROM PUBLIC
10:38AM 10 RECORDING OF THE SOPHISTICATED TOOLS THAT THE FBI USES EVERY
10:38AM 11 DAY TO ACCESS FORENSIC DATA FROM COMPUTERS. THERE'S NO
10:38AM 12 EVIDENCE THAT THE GOVERNMENT ACTED ON THAT SUGGESTION. THERE'S
10:38AM 13 NO EVIDENCE TO THIS DAY THAT THE GOVERNMENT HAS EVER ASKED ITS
10:38AM 14 COUNTERPARTS IN THE FBI IF THEY COULD OPEN THE DATABASE.

10:38AM 15 AGAIN, THE SUPPORT STAFF SUGGESTED THAT THEY GET THE
10:38AM 16 PHYSICAL SERVERS. THERE'S NO EVIDENCE THAT THEY DID THAT.

10:38AM 17 THERE'S NO EVIDENCE THAT THE GOVERNMENT DID MUCH OF
10:38AM 18 ANYTHING FOR A YEAR AND A HALF, WHICH IS THE FIRST TIME THAT IT
10:38AM 19 REALIZED IT NEEDED A PASSWORD. AND AT THAT POINT IT WAS TOO
10:38AM 20 LATE TO TRACK DOWN THE PEOPLE WHO MIGHT HAVE THAT PASSWORD.

10:38AM 21 THE COURT: RIGHT, BECAUSE THEY RECEIVED IT ON
10:38AM 22 AUGUST 27TH, AND FOUR DAYS LATER IT WAS DECOMMISSIONED NOT BY
10:38AM 23 THE GOVERNMENT BUT BY SOMEONE ELSE, SOMEONE, A THIRD PARTY. I
10:38AM 24 DON'T KNOW WHO DID THAT, BUT PERHAPS IT'S IN THE PROCESS OF
10:38AM 25 DECOMMISSIONING.

1 SO FOR THOSE FOUR DAYS THE GOVERNMENT SHOULD HAVE,
2 ACCORDING TO YOUR POSITION, SHOULD HAVE ACCESSED IT TO
3 DETERMINE WHETHER OR NOT THEY COULD ACTUALLY OPEN IT UP IN
4 THOSE FOUR DAYS BECAUSE THAT WAS THE LIFESPAN OF THE DATABASE,
5 AT LEAST AS IT EXISTED BEFORE IT WAS DECOMMISSIONED.

6 SO THEY SHOULD HAVE DONE SOMETHING IN THOSE FOUR DAYS, BUT
7 THEY DIDN'T. SO IT SEEMS LIKE WHATEVER THEY DID AFTERWARDS,
8 ISN'T THAT KIND OF IMMATERIAL BECAUSE THEY COULDN'T HAVE DONE
9 THAT?

10 732-4 I THINK IS A JUNE 25TH EMAIL FROM DAVID TAYLOR TO
11 SOMEBODY, AND IT'S REGARDING A MEETING ON THE LIS. I THINK YOU
12 SEE THAT. AND DIDN'T HE SAY "WE SHOULD JUST GIVE THE DOJ THE
13 DATABASE AND LET THEM FIGURE IT OUT. THEY WON'T KNOW WHAT TO
14 DO WITH IT AND THAT THE PEOPLE WHO DO ARE IN INDIA. OUR
15 EXPERTS ARE THE ONLY ONES WHO UNDERSTAND IT, AND WE DON'T WANT
16 TO MAKE THEM PERCIPIENT WITNESSES. IS THERE ANYONE LEFT IN THE
17 COMPANY WHO CAN ASSIST US IN ACTUALLY GETTING THE DATABASE TO
18 THE GOVERNMENT?" AND THIS WAS AT A PRE-INDICTMENT TIME.

19 AND THERANOS HAD, OF COURSE, CONTROL OF THE LIS. THEY HAD
20 ACCESS TO IT. SO DOESN'T THAT SUGGEST THAT AT LEAST THERE WAS
21 SOME KNOWLEDGE, I WON'T CALL IT SCIENTER, BUT THERE WAS SOME
22 KNOWLEDGE THAT THIS KEY HAD TO BE CREATED BACK THEN?

23 AND I'M GETTING A LITTLE AHEAD OF OURSELVES, BUT IT SEEMS
24 LIKE YOUR CLIENT, AT LEAST THE DEFENSE, WOULD HAVE ALSO KNOWN
25 OF THE IMPORTANCE OF THIS SUCH THAT -- AND THIS IS KIND OF A

10:40AM 1 BALANCING, I SUPPOSE, PART OF OUR BALANCING CONVERSATION --
10:40AM 2 SUCH THAT BECAUSE YOUR CLIENT HAD, LET'S CALL IT, PRIVACY TO
10:40AM 3 THE DATABASE AND KNOWLEDGE OF ITS IMPORTANCE, SHE, TOO, COULD
10:40AM 4 HAVE SECURED A COPY. IS THAT SOMETHING THAT SHOULD ENTER INTO
10:40AM 5 THE CONVERSATION OR THE EQUATION?

10:40AM 6 I'VE ASKED YOU A LOT THERE, MS. SAHARIA. I APOLOGIZE.

10:40AM 7 MS. SAHARIA: YEAH. SO I THINK THAT THERE ARE THREE
10:40AM 8 COMPONENTS TO THAT. LET ME START WITH THE FIRST ONE.

10:40AM 9 OUR ARGUMENT DOES NOT REST ON FOUR DAYS. THE FACT THAT
10:41AM 10 THE COPY WAS PRODUCED AND FOUR DAYS LATER THE PHYSICAL SERVER
10:41AM 11 WAS TAKEN APART AND MOVED IS NOT MATERIAL TO OUR ARGUMENT
10:41AM 12 BECAUSE THERE ARE STEPS THAT THE GOVERNMENT REASONABLY SHOULD
10:41AM 13 HAVE TAKEN EVEN AFTER THOSE FOUR DAYS.

10:41AM 14 FIRST, REACHED OUT TO THERANOS -- FIGURED OUT THAT THEY
10:41AM 15 COULDN'T OPEN THE DATABASE AND WHY. AND THE REASON PRESUMABLY,
10:41AM 16 ACCORDING TO THE GOVERNMENT, IS BECAUSE THEY LACKED THE
10:41AM 17 PASSWORD. IT TOOK THEM A YEAR AND A HALF TO REALIZE THAT. BUT
10:41AM 18 IF THEY REALIZED THAT PROMPTLY, NOT WITHIN FOUR DAYS BUT WITHIN
10:41AM 19 A REASONABLE AMOUNT OF TIME, THEY COULD HAVE TALKED TO
10:41AM 20 THERANOS'S COUNSEL, ALERTED THEM TO THIS ISSUE, AND THEY COULD
10:41AM 21 HAVE, ONE WOULD THINK, FOUND SOMEONE WHO HAD THE APPROPRIATE
10:42AM 22 PASSWORD.

10:42AM 23 THERE IS EVIDENCE IN THE RECORD OF VARIOUS PEOPLE WHO
10:42AM 24 MIGHT HAVE HAD THAT PASSWORD, NONE OF WHOM THE GOVERNMENT
10:42AM 25 APPROACHED AT THE RELEVANT TIME OR THEY DIDN'T APPROACH THE

1 COUNSEL EITHER TO TRY TO GET THE PASSWORD.

2 LIKEWISE, AS I'VE ALREADY INDICATED, THE PHYSICAL SERVER
3 WAS, WE BELIEVE THIS WOULD COME OUT AT A HEARING, STILL
4 AVAILABLE IN THE POSSESSION OF THE ASSIGNEE. THEY COULD HAVE
5 TAKEN THE PHYSICAL SERVER AT THAT TIME AND USED THE PHYSICAL
6 SERVER TO ACCESS THE LIS DATABASE.

7 SO THAT'S, THAT'S -- I THINK THE FIRST QUESTION IS WE'RE
8 NOT SAYING THEY HAD TO DO ALL OF THESE THINGS IN FOUR DAYS, BUT
9 PROSECUTORS HAVE AN OBLIGATION TO ACT DILIGENTLY AND PROMPTLY
10 WHEN THEY'RE DEALING WITH THE MOST CRITICAL EVIDENCE IN THE
11 CASE AND EVIDENCE THAT HAS EXTREME EXCULPATORY VALUE TO A
12 DEFENDANT TO MAKE SURE THAT THAT EVIDENCE IS PRESERVED AND
13 AVAILABLE TO THE DEFENDANT, AND THEY DIDN'T DO THAT HERE. SO
14 THAT'S THE FIRST QUESTION.

15 THE COURT: YOUR CLIENT HAD, YOUR CLIENT HAD ACTUAL
16 POSSESSION OF THE DATABASE BEFORE IT WAS DECOMMISSIONED.

17 MS. SAHARIA: WELL, THERANOS DID.

18 THE COURT: YES.

19 MS. SAHARIA: AT THE TIME OF THE DECOMMISSIONING,
20 MS. HOLMES WAS NOT CEO OF THE COMPANY. SHE HAD ALREADY BEEN
21 INDICTED.

22 THE GOVERNMENT HAS PRODUCED NO EVIDENCE DESPITE ITS
23 CONTINUED INSINUATIONS THAT MS. HOLMES HAD ANY KNOWLEDGE OF ANY
24 OF THESE FACTS.

25 THE COURT: SURE. THAT WAS --

10:43AM 1 MS. SAHARIA: NOW, WITH RESPECT TO WHETHER SHE COULD
10:43AM 2 HAVE SECURED THE DATABASE, I'M NOT SURE WHAT I CAN DISCLOSE
10:43AM 3 ABOUT THAT ISSUE WITHOUT DISCLOSING PRIVILEGED COMMUNICATIONS,
10:43AM 4 SO I DON'T FEEL COMFORTABLE ANSWERING YOUR HONOR'S QUESTION AT
10:43AM 5 THIS TIME OTHER THAN TO SAY THAT MS. HOLMES HAS ALWAYS BELIEVED
10:43AM 6 THAT THE DATABASE WOULD BE EXCULPATORY IN THIS CASE.

10:43AM 7 THE SECOND QUESTION THAT YOUR HONOR ASKED RELATES TO --

10:44AM 8 THE COURT: THEN WHY DIDN'T YOU HAVE A COPY OF IT,
10:44AM 9 THEN? I GUESS I'M NOT MISSING -- I'M MISSING THAT PART. IS
10:44AM 10 THAT PART OF THE BALANCING THAT IT WAS NOT IN THE GOVERNMENT'S
10:44AM 11 POSSESSION, THE ACTUAL WORKING COPY? THE GOVERNMENT NEVER HAD
10:44AM 12 AN ACTUAL WORKING COPY OF THE DATABASE. THERANOS DID.

10:44AM 13 AND AS YOU JUST SAID, IT WAS ALWAYS IMPORTANT TO YOUR
10:44AM 14 CLIENT FOR THE EXCULPATORY REASONS. SHE HAD COUNSEL AT THE
10:44AM 15 TIME THAT THIS WAS GOING ON.

10:44AM 16 DOES THAT FACT ENTER INTO THE BALANCING AT ALL?

10:44AM 17 MS. SAHARIA: I'M RELUCTANT TO ANSWER THAT QUESTION
10:44AM 18 WITHOUT CONSULTING WITH THE REST OF MY TEAM AND MY CLIENT --

10:44AM 19 THE COURT: OKAY. SURE. OF COURSE.

10:44AM 20 MS. SAHARIA: -- BECAUSE I DON'T WANT TO REVEAL
10:44AM 21 PRIVILEGED COMMUNICATIONS OR COMMON INTEREST PRIVILEGED
10:44AM 22 COMMUNICATIONS, YOUR HONOR.

10:44AM 23 THE COURT: OKAY. FAIR ENOUGH. FAIR ENOUGH.

10:44AM 24 MS. SAHARIA: BUT I WILL CONSULT WITH MY TEAM ABOUT
10:44AM 25 THAT QUESTION.

10:45AM 1 YOU HAD ALSO ASKED A QUESTION ABOUT A PARTICULAR EMAIL
10:45AM 2 FROM MR. TAYLOR WHO DID BECOME THE CEO OF THE COMPANY. I DON'T
10:45AM 3 THINK ANYTHING IN THAT EMAIL REVEALS ANY SORT OF NEFARIOUS
10:45AM 4 INTENT TO HIDE A PASSWORD FROM THERANOS, EXCUSE ME, FROM THE
10:45AM 5 GOVERNMENT. THERE'S NOTHING I THINK IN THAT EMAIL ABOUT THAT
10:45AM 6 FACT, BUT I DO THINK THAT'S WHY ALL OF THESE ISSUES CREATE
10:45AM 7 DISPUTED ISSUES OF FACT THAT SHOULD BE EXPLORED AT A HEARING.

10:45AM 8 WHAT DID THE GOVERNMENT KNOW ABOUT THE IMPLICATIONS OF
10:45AM 9 THERANOS CLOSING?

10:45AM 10 WHY DID IT WAIT A YEAR AND A HALF TO SECURE THE MOST
10:45AM 11 IMPORTANT EVIDENCE IN THE CASE AT A TIME WHEN IT KNEW THE
10:45AM 12 COMPANY WAS ABOUT TO CLOSE AND THAT IT MAY LACK ACCESS TO THAT
10:45AM 13 INFORMATION?

10:45AM 14 WHY DID IT SIT WITH THE HARD COPY OF THE LIS DATABASE FOR
10:45AM 15 A YEAR AND A HALF?

10:46AM 16 WHY DID IT SHOW SUCH LITTLE INTEREST IN THIS EVIDENCE THAT
10:46AM 17 IT CLAIMS WOULD HAVE BEEN INCULPATORY, THE MOST RELEVANT
10:46AM 18 EVIDENCE IN THE CASE, AND IT SHOWED NO INTEREST IN ACCESSING IT
10:46AM 19 FOR A YEAR AND A HALF, AND BY THE TIME IT FINALLY TRIED TO
10:46AM 20 ACCESS IT, ALL OF THE WITNESSES WHO COULD HAVE PROVIDED A
10:46AM 21 PASSWORD PRESUMABLY DON'T HAVE ACCESS TO IT ANYMORE, AND THE
10:46AM 22 PHYSICAL SERVER THAT COULD HAVE BEEN RESTORED, ACCORDING TO THE
10:46AM 23 EXPERTS WHO WORKED AT THERANOS, ALSO HAD BEEN LOST?

10:46AM 24 SO IT IS FUNDAMENTALLY THE GOVERNMENT'S LACK OF DILIGENCE,
10:46AM 25 ITS FAILURE TO HEED THE ADVICE OF ITS STAFF THAT HAS PUT -- AND

1 ITS EXTREME DELAY IN TRYING TO GET THIS EVIDENCE IN THE FIRST
2 PLACE THAT IS AT LEAST PARTLY TO BLAME FOR OUR INABILITY TO USE
3 THE DATABASE.

4 I'VE JUMPED AHEAD TO KIND OF COVERING A LOT OF THE FACTS.
5 LET ME JUST, IF I MAY, TOUCH ON A FEW LEGAL ISSUES THAT I THINK
6 COME OUT OF THE PARTIES' BRIEFS, AND THEN I'LL GO BACK AND
7 COVER A FEW OF THE OTHER RELEVANT FACTS HERE.

8 AS I INDICATED AT THE BEGINNING, WE HAVE MOVED UNDER TWO
9 STANDARDS. THE FIRST IS THE DUE PROCESS CLAUSE AND THE SECOND
10 IS LOUD HAWK.

11 THE LOUD HAWK STANDARD GOVERNS SANCTIONS THAT ARE LESS
12 THAN DISMISSAL SUCH AS SUPPRESSION, AND THE LOUD HAWK TEST IS
13 GOVERNED BY THEN JUDGE KENNEDY'S, JUSTICE KENNEDY'S CONCURRING
14 OPINION IN THAT CASE THAT HAS BEEN ADOPTED BY THE NINTH CIRCUIT
15 AS THE LAW OF THE CIRCUIT.

16 JUDGE KENNEDY ARTICULATED A BALANCING TEST THAT I THINK
17 YOUR HONOR HAS ALLUDED TO. YOU HAVE ON ONE SIDE THE QUALITY OF
18 THE GOVERNMENT CONDUCT THAT IS WEIGHED AGAINST THE PREJUDICE TO
19 THE DEFENDANT. AND AS JUDGE KENNEDY EXPLAINED, IT'S DONE ON A
20 SLIDING SCALE OF SORTS. SO THE GREATER THE PREJUDICE TO THE
21 DEFENDANT, THE LESS CULPABLE CONDUCT YOU REQUIRE FROM THE
22 GOVERNMENT AND VICE VERSA, THE MORE CULPABLE THE GOVERNMENT
23 CONDUCT, THE LESS THE AMOUNT OF PREJUDICE THAT WOULD BE
24 REQUIRED. AND IN CASES OF SEVERE PREJUDICE, FOR EXAMPLE, HE
25 SAID THE GOOD FAITH OR BAD FAITH OF THE GOVERNMENT MIGHT BE

1 IMMATERIAL TO CONDUCTING THAT BALANCING TEST.

2 AS I INDICATED BEFORE, IT'S THE GOVERNMENT'S BURDEN UNDER
3 THAT TEST TO JUSTIFY ITS CONDUCT, AND THEN THE DEFENDANT BEARS
4 THE BURDEN TO ESTABLISH PREJUDICE.

5 LET ME JUST TOUCH ON TWO ISSUES THAT RELATE TO THAT
6 BALANCING TEST THAT COME OUT OF THE GOVERNMENT'S OPPOSITION
7 BRIEF.

8 FIRST, THE GOVERNMENT REPEATEDLY CLAIMS IN ITS BRIEF THAT
9 BAD FAITH IS REQUIRED. UNDER LOUD HAWK THAT IS SIMPLY
10 INCORRECT. THAT'S AN INCORRECT STATEMENT OF THE LAW.

11 THE GOVERNMENT CITED JUDGE TRASK'S OPINION IN LOUD HAWK
12 FOR THAT PROPOSITION WHERE THEY STATED THAT BAD FAITH OR
13 CONNIVANCE IS REQUIRED. BUT JUDGE TRASK'S OPINION IS NOT THE
14 LAW OF THE CIRCUIT, JUDGE KENNEDY'S OPINION IS. AND AS I'VE
15 INDICATED, JUDGE KENNEDY'S OPINION IS CRYSTAL CLEAR THAT BAD
16 FAITH IS NOT REQUIRED.

17 THE SECOND IS THAT THE SAME INQUIRY UNDER LOUD HAWK
18 APPLIES TO A CASE WHERE THE GOVERNMENT EITHER FAILED TO
19 PRESERVE EVIDENCE IN ITS POSSESSION OR FAILED TO COLLECT
20 EVIDENCE.

21 WE THINK THIS IS NOT A CASE ABOUT A FAILURE TO COLLECT FOR
22 THE REASONS WE'VE BEEN DISCUSSING. THE GOVERNMENT DID HAVE A
23 COPY OF THE LIS DATABASE IN ITS POSSESSION AND DIDN'T TAKE ANY
24 STEPS TO TRY TO MAKE IT WORK, BUT EVEN IF THE COURT THOUGHT
25 THAT THIS WAS A CASE ABOUT A FAILURE TO COLLECT, WHEN

1 JUDGE KENNEDY ENUMERATED THE FACTORS THAT ARE RELEVANT TO THE
2 GOVERNMENT CONDUCT, ONE OF THE FACTORS IS, QUOTE, "WHETHER THE
3 EVIDENCE WAS LOST OR DESTROYED WHILE IN ITS CUSTODY."

4 SO THAT IS A RELEVANT FACTOR, WHETHER THE GOVERNMENT HAD
5 CUSTODY OF THE EVIDENCE WHEN IT WAS LOST, BUT IT'S NOT
6 DISPOSITIVE. JUDGE KENNEDY CLEARLY ARTICULATED THAT AS ONE OF
7 SEVERAL RELEVANT FACTORS. AND SO WE SUBMIT THAT THE
8 GOVERNMENT'S SUBMISSION TO THE COURT THAT THAT IS DISPOSITIVE
9 IS NOT SUPPORTED BY LOUD HAWK AND NO NINTH CIRCUIT CASE SO
10 HOLDS.

11 I'M NOT GOING TO DISCUSS THE DUE PROCESS INQUIRY UNTIL THE
12 COURT HAS QUESTIONS ABOUT THAT, BUT I WILL JUST NOTE THAT IT'S
13 ALSO CRYSTAL CLEAR UNDER NINTH CIRCUIT LAW THAT A FAILURE TO
14 COLLECT EVIDENCE CAN GIVE RISE TO A DUE PROCESS VIOLATION IF IT
15 OCCURS IN BAD FAITH, AND THAT'S THE MILLER VERSUS VASQUEZ CASE.

16 SO, YOUR HONOR, WE'VE ALREADY DISCUSSED SOME OF THE
17 RELEVANT FACTS THAT WE THINK GIVE RISE TO A DISPUTE OF FACT
18 WITH RESPECT TO THE GOVERNMENT'S CONDUCT. THE GOVERNMENT
19 ITSELF HAS CONCEDED THAT DISPUTE IN THE PAST. AT THE MAY 4TH
20 HEARING IT SAID, "WHEN IT COMES TO BLAME FOR THE LOSS OF THE
21 LIS, AS THE COURT CAN TELL THIS IS A VERY HOTLY DEBATED FACTUAL
22 DISPUTE." THAT WAS AT PAGE 81 AND THEN AGAIN AT PAGE 83. SO
23 THERE IS A FACTUAL DISPUTE HERE. THE GOVERNMENT RECOGNIZES
24 THAT.

25 WE FULLY AGREE THERE IS A DISPUTE OF FACT. EVEN IF THE

1 COURT THINKS THAT THERE IS SOME BLAME ON THE THERANOS SIDE,
2 AND, AGAIN, NONE OF THAT BLAME LIES WITH MS. HOLMES, THERE'S A
3 WHOLE HOST OF FACTS THAT ARE NOT YET CLEAR BOTH WITH RESPECT TO
4 WHAT HAPPENED ON THE THERANOS SIDE OF THINGS AND WITH RESPECT
5 TO WHAT HAPPENED ON THE GOVERNMENT'S SIDE OF THINGS AND IN
6 PARTICULAR THE REASONS WHY THE PROSECUTORS BOTH DELAYED SO LONG
7 IN ATTEMPTING TO COLLECT THE EVIDENCE AND THEN WHY THEY DELAYED
8 SO LONG IN ATTEMPTING TO ACCESS THE EVIDENCE SUCH THAT THE
9 ABILITY TO ACCESS IT OR TO OBTAIN THE PHYSICAL SERVER WAS AT
10 THAT POINT GONE.

11 THE GOVERNMENT CLEARLY KNEW THE VALUE OF LIS. IT HAD
12 KNOWN FOR A YEAR AND A HALF, SINCE DECEMBER OF 2016 AT LEAST,
13 ABOUT THE LIS DATABASE. IT KNEW THAT IT CONTAINED ALL OF THE
14 TEST RESULTS. IT KNEW THAT IT IDENTIFIED THE SPECIFIC DEVICE
15 THAT GENERATED EACH RESULT WHICH IS VERY IMPORTANT EVIDENCE IN
16 THIS CASE THAT HAS BEEN LOST. IT KNEW THAT THE ACCURACY AND
17 RELIABILITY OF THE TEST RESULTS WOULD BE CENTRAL TO ITS CASE
18 GIVEN THE ALLEGATIONS IN THE INDICTMENT, AND IT KNEW THAT SOME
19 DOCTORS WHO HAD SENT PATIENTS TO LIS BELIEVED THAT THEIR TEST
20 RESULTS WERE ACCURATE AND RELIABLE. THOSE TEST RESULTS
21 OF COURSE RESIDED IN THE LIS AND CONSTITUTE EXCULPATORY
22 EVIDENCE THAT WAS IN THE LIS.

23 I'M NOT GOING TO REPEAT THE FACTS THAT WE HAVE TALKED
24 ABOUT WITH RESPECT TO THE GOVERNMENT'S BOTH DISREGARDING OF THE
25 ADVICE FROM THERANOS'S COUNSEL ABOUT WHAT THEY NEEDED TO DO TO

1 RESTORE THE DATABASE, TO OBTAIN THE SPECIFIC SOFTWARE, NOR --
2 AND THEN AS WELL AS THE ADVICE FROM THE SUPPORT STAFF. JUST
3 FOR THE RECORD, THAT'S OUTLINED IN THE GOVERNMENT'S BRADY
4 LETTER AT PARAGRAPHS 46 TO 47 AND 49. AS I INDICATED, THERE IS
5 REASON TO THINK THAT THOSE WOULD HAVE BEEN FRUITFUL AVENUES
6 EITHER CONSULTING WITH THE FBI OR OBTAINING THE ACTUAL PHYSICAL
7 HARDWARE WHICH MULTIPLE WITNESSES HAVE SAID COULD HAVE BEEN
8 RESTORED.

9 TO BE SURE THE GOVERNMENT -- YOU KNOW, I'M SURE WE'RE
10 GOING TO HEAR THIS -- WANTS TO PIN THE BLAME ON THE THERANOS
11 INDIVIDUALS WHO PRODUCED THE DATABASE COPY, AGAIN, THAT WAS
12 ONLY ONE OF TWO PATHS. THAT DOESN'T ADDRESS THE SERVER ITSELF
13 AND THE GOVERNMENT'S FAILURE TO COLLECT THAT PHYSICAL SERVER.
14 BUT AGAIN, EVEN WITH RESPECT TO THAT, WHAT HAPPENED WITH THE
15 DATABASE COPY, THE RECORD IS JUST NOT VERY PRECISE ABOUT WHY
16 THAT HAPPENED, WHAT THOSE INDIVIDUALS THOUGHT ABOUT WHETHER THE
17 GOVERNMENT COULD ACCESS THAT COPY.

18 AND WITH THE BURDEN ON THE GOVERNMENT TO JUSTIFY ITS
19 CONDUCT AND THEIR FAILURE TO JUSTIFY THEIR EXTREME DELAYS IN
20 BOTH OBTAINING AND ACCESSING THE COPY, WE JUST THINK THEY
21 HAVEN'T MADE THAT SHOWING AT THIS POINT AND THAT IS WHY A
22 HEARING IS REQUIRED.

23 THE COURT: THANK YOU.

24 LET ME ASK, MS. SAHARIA, WE'RE TALKING ABOUT ANECDOTAL,
25 AND THIS IS PART OF THE IN LIMINE MOTIONS, WHETHER OR NOT

10:54AM 1 ANECDOTAL INFORMATION CAN COME IN. YOUR IN LIMINE MOTION,
10:54AM 2 MAYBE IT WAS THE GOVERNMENT'S, SOUGHT TO PRECLUDE YOU, HOUR
10:54AM 3 TEAM, FROM USING THE TERM "ANECDOTAL. I THINK THERE WAS
10:54AM 4 SOMETHING PEJORATIVE ABOUT THAT TERM IN THE GOVERNMENT'S MIND.

10:55AM 5 AND I THINK I SAID, NO, YOU CAN PUT ON A DEFENSE. YOU
10:55AM 6 CAN CALL IT WHAT YOU WOULD LIKE, ET CETERA.

10:55AM 7 IN THAT REGARD IT SEEMS LIKE THERE'S CRITICISM OF AT LEAST
10:55AM 8 THE STATE OF THE EVIDENCE NOW, PRETRIAL I UNDERSTAND, THAT
10:55AM 9 THERE WAS ARGUMENT IN LIMINE THAT, WELL, THEY'RE ONLY GOING TO
10:55AM 10 HAVE 11 WITNESSES WHO ARE TALKING TO TALK ABOUT BAD TESTS, I'LL
10:55AM 11 JUST CALL IT BAD TESTS, INCORRECT TESTS, AND THAT'S NOT ENOUGH.
10:55AM 12 AND THAT WAS, I THINK, THE DEFENSE ARGUMENT AS TO AN ISSUE.

10:55AM 13 BUT IN THE DOCUMENTS THAT I'VE READ IN REGARDS TO THIS
10:55AM 14 MOTION, I THINK YOU TALK ALSO ABOUT -- YOUR TEAM, NOT YOU BUT
10:55AM 15 YOUR TEAM, TALK ABOUT YOU HAVE OTHER DOCTORS WHO, INCLUDING A
10:55AM 16 DOCTOR WHO IS GOING TO SAY, OH, THEY WERE MY GO TO. THERANOS
10:55AM 17 WAS MY GO-TO TESTER, AND I HAD GREAT CONFIDENCE IN THEM.

10:55AM 18 I RAISE THAT BECAUSE THAT SEEMS THAT YOU HAVE EVIDENCE
10:55AM 19 THAT YOU CAN PUT ON TO REBUT, TO CHALLENGE THE ANECDOTAL, I'LL
10:56AM 20 CALL IT, EVIDENCE THAT THE GOVERNMENT IS GOING TO PUT ON
10:56AM 21 VIS-A-VIS THESE DOCTORS THAT YOU HAVE IDENTIFIED AND OTHER
10:56AM 22 WITNESSES THAT YOU HAVE IDENTIFIED IN THESE PLEADINGS.

10:56AM 23 IS THAT ACCURATE?

10:56AM 24 MS. SAHARIA: SO I THINK THAT QUESTION BRINGS US TO
10:56AM 25 THE SECOND PART OF THE BALANCING TEST, WHICH IS WHAT IS THE

10:56AM 1 PREJUDICE TO THE DEFENSE?

10:56AM 2 AND ONE OF THE FACTORS THAT JUDGE KENNEDY OUTLINED IN
10:56AM 3 LOUD HAWK IS THE ADEQUACY OF THE SUBSTITUTE EVIDENCE, IN THIS
10:56AM 4 CASE SUBSTITUTE EVIDENCE, ANECDOTES FROM INDIVIDUAL DOCTORS,
10:56AM 5 FOR INSTANCE, THAT THEY RECEIVED IN ACCURATE TEST RESULTS.

10:56AM 6 AND WE WOULD SUBMIT THAT THERE'S NO SUBSTITUTE FOR THE
10:56AM 7 LIS DATABASE. THE GOVERNMENT ADMITTED THIS ITSELF IN ITS
10:56AM 8 OPPOSITION BRIEF TO OUR MOTION TO EXCLUDE ANECDOTAL EVIDENCE.
10:56AM 9 THIS WAS ECF 682, PAGE 1. THEY SAID, "DATA IS A POWERFUL THING
10:57AM 10 BECAUSE IT SPEAKS FOR ITSELF."

10:57AM 11 WE TOTALLY AGREE WITH THAT. THERE'S NOTHING LIKE HAVING
10:57AM 12 THE ACTUAL DATA AND THE ACTUAL TEST RESULTS AND ALL OF THE
10:57AM 13 INFORMATION ABOUT THOSE TEST RESULTS TO CONVINCE A JURY THAT
10:57AM 14 THE GOVERNMENT'S CASE IS WRONG.

10:57AM 15 AN ANECDOTE FROM A DOCTOR THAT THEY HAD A GOOD EXPERIENCE
10:57AM 16 IS NO SUBSTITUTE FOR HARD COLD SCIENTIFIC DATA THAT RESIDED IN
10:57AM 17 THE DATABASE.

10:57AM 18 I CAN GIVE THE COURT I THINK MAYBE FIVE EXAMPLES OF THE
10:57AM 19 EXTREME PREJUDICE THAT HAS ACCRUED TO MS. HOLMES FROM THE
10:57AM 20 INABILITY TO ACCESS THE LIS DATA THAT I THINK GO TO THIS
10:57AM 21 QUESTION.

10:57AM 22 THE FIRST IS VAST QUANTITIES OF ACCURATE AND RELIABLE TEST
10:57AM 23 RESULTS RESIDE IN THE LIS DATABASE, RESIDED IN THE DATABASE I
10:57AM 24 SHOULD SAY, ALMOST CERTAINLY MILLIONS OF THEM.

10:57AM 25 AND WE CAN, YOU KNOW, CALL A DOCTOR TO TALK ABOUT THEIR

10:58AM 1 ANECDOTAL EXPERIENCE TO TRY TO COUNTER THE GOVERNMENT'S
10:58AM 2 ANECDOTES, BUT THAT'S NO MATCH FOR THE MILLIONS OF WHAT WE
10:58AM 3 BELIEVE ARE MILLIONS OF ACCURATE RESULTS IN THE DATABASE.

10:58AM 4 NOW, THE GOVERNMENT RESPONDS TO THAT, WELL, THAT YOU CAN'T
10:58AM 5 KNOW FROM ANY ONE TEST RESULT IN THE DATABASE WHETHER IT WAS
10:58AM 6 ACCURATE OR NOT. YOU KNOW, MAYBE IT WAS WITHIN A NORMAL RANGE,
10:58AM 7 BUT THE PATIENT ACTUALLY SHOULD HAVE HAD AN ABNORMAL TEST
10:58AM 8 RESULT, AND SO YOU CAN'T KNOW THAT IT'S ACCURATE. THAT'S THEIR
10:58AM 9 RESPONSE.

10:58AM 10 PERHAPS IT'S TRUE AS TO ONE INDIVIDUAL TEST RESULT, BUT
10:58AM 11 WHEN YOU HAVE MILLIONS OF TEST RESULTS, YOU, OF COURSE, CAN
10:58AM 12 PERFORM ANALYSES WITH THAT DATA THAT WOULD LEAVE A JURY TO
10:58AM 13 CONCLUDE THAT THEY WERE ACCURATE AND RELIABLE.

10:58AM 14 FOR EXAMPLE, YOU COULD IDENTIFY THE SPREAD OF TEST RESULTS
10:58AM 15 THAT OCCURRED OVER VARIOUS REFERENCE RANGES AND DETERMINE HOW
10:58AM 16 MANY OF THEM FELL WITHIN THE EXPECTED RANGE. WERE THERE AN
10:58AM 17 EXTREME NUMBER OF OUTLIERS OR NOT? AND IF THERE WERE NOT, THAT
10:59AM 18 WOULD BE PRETTY GOOD EVIDENCE TO A JURY THAT THESE TESTS WERE
10:59AM 19 ACCURATE AND RELIABLE BECAUSE THEY FELL WITHIN THE EXPECTED
10:59AM 20 RANGE. AND WE CAN'T --

10:59AM 21 THE COURT: DID THE LIS -- I'M SORRY, MS. SAHARIA.

10:59AM 22 MS. SAHARIA: YES.

10:59AM 23 THE COURT: DID THE LIS ALLOW FOR THE INTRODUCTION
10:59AM 24 OF THIRD PARTY TESTS?

10:59AM 25 I THINK THE EVIDENCE SEEMS TO SHOW THAT THERE WERE THIRD

10:59AM 1 PARTY TESTS THAT WERE TAKEN FROM PATIENTS WHO, FOR WHATEVER
10:59AM 2 REASON, WANTED TO GET A TEST OUTSIDE OF THERANOS, THEY GOT A
10:59AM 3 DIFFERENT RESULT. AND JUST FOR PURPOSES OF OUR DISCUSSION,
10:59AM 4 I'LL SAY THAT THEY BELIEVED THAT THAT THIRD PARTY TEST WAS MORE
10:59AM 5 ACCURATE.

10:59AM 6 AND DID THE LIS CONTAIN INFORMATION SUCH THAT THE ACCURATE
10:59AM 7 TESTS, THE THIRD PARTY TEST WAS REINTRODUCED INTO THE LIS?

10:59AM 8 MS. SAHARIA: I DON'T BELIEVE SO, YOUR HONOR. BUT
10:59AM 9 IF I'M WRONG, MR. WADE CAN JUMP IN AND SAY SO.

11:00AM 10 THERE ARE CIRCUMSTANCES WHERE THERANOS ITSELF WOULD SEND
11:00AM 11 CERTAIN TESTS OUT TO A THIRD PARTY VENDOR IF IT DIDN'T HAVE THE
11:00AM 12 CAPACITY TO CONDUCT THAT PARTICULAR TEST. I UNDERSTAND THAT
11:00AM 13 THAT IS COMMON IN THE LABORATORY INDUSTRY. THEY'RE CALLED
11:00AM 14 REFERENCE LABS.

11:00AM 15 I THINK THAT INFORMATION WOULD BE INCLUDED IN THE
11:00AM 16 LIS DATABASE. THAT IS IMPORTANT INFORMATION, THE PARTICULAR
11:00AM 17 WAY THAT A TEST WAS CONDUCTED, WHICH DEVICE WAS IT CONDUCTED
11:00AM 18 ON. WAS IT CONDUCTED ON THE THERANOS DEVICE OR WAS IT
11:00AM 19 CONDUCTED ON A COMMERCIALLY AVAILABLE DEVICE? THAT'S CRITICAL
11:00AM 20 INFORMATION THAT IS NOW LOST TO US BECAUSE -- TAKE ONE OF THE
11:00AM 21 GOVERNMENT'S ANECDOTAL PATIENTS WHO IS GOING TO COME IN AND SAY
11:00AM 22 THEIR TEST RESULT WAS INACCURATE. IF WE CAN SHOW AT THE LIS
11:00AM 23 DATABASE THAT THAT TEST RESULT WAS NOT RUN ON A THERANOS DEVICE
11:00AM 24 BUT WAS RUN ON SOME OTHER COMMERCIALLY AVAILABLE DEVICE, THAT
11:01AM 25 WOULD BE PRETTY GOOD EVIDENCE THAT THE ERROR WAS NOT THE RESULT

1 OF THERANOS TECHNOLOGY, IT WAS THE RESULT OF SOME OTHER FACTOR.

2 SO WE CAN'T MEET THE GOVERNMENT'S ANECDOTES WITHOUT ACCESS
3 TO THE FULL RANGE OF LIS DATA THAT RELATES TO THESE TEST
4 RESULTS.

5 THE COURT: IS THAT ONE OF THE ALLEGATIONS THAT THE
6 GOVERNMENT MAKES THAT THERANOS WAS REPRESENTING THAT ALL OF THE
7 TESTS WERE DONE ON THEIR PROPRIETARY DEVICES WHEN, IN FACT,
8 THEY WERE DONE ON A SEPARATE DEVICE? SO WOULDN'T THAT BE
9 INCULPATING EVIDENCE?

10 MS. SAHARIA: WELL, WITH RESPECT TO THE PATIENT
11 COUNTS THAT WOULD BE EXCULPATING EVIDENCE, YOUR HONOR, BECAUSE
12 THEIR CLAIM IS THAT THERANOS TECHNOLOGY WAS INCAPABLE OF
13 PRODUCING ACCURATE AND RELIABLE RESULTS.

14 SO IF A PATIENT IS GOING TO COME IN AND TALK ABOUT AN
15 INACCURATE TEST RESULT BUT THE CAUSE OF THAT INACCURACY CANNOT
16 POSSIBLY BE THERANOS TECHNOLOGY, THAT WOULD BE EXCULPATORY
17 INFORMATION WITH RESPECT TO THAT INDIVIDUAL PATIENT BECAUSE IT
18 WOULD SHOW THE CAUSE MUST BE SOMETHING ELSE.

19 NOW, A FEW OTHER EXAMPLES. WITH RESPECT TO THE CMS
20 REPORT, FOR EXAMPLE, WE CAN'T ADEQUATELY REBUT THE GOVERNMENT'S
21 RELIANCE ON THE CMS REPORT WITHOUT ACCESS TO LIS BECAUSE THE
22 DATA, YOU KNOW, THE SMALL SAMPLES OF DATA THAT ARE REFLECTED IN
23 THE CMS REPORT OF COURSE CAME OUT OF LIS. THEY REFLECT
24 INFORMATION IN LIS, BUT THEY'RE ONLY FOR LIMITED TIME PERIODS.
25 AND WE LACK THE FULL DATA FROM LIS THAT WOULD BE NECESSARY TO

11:02AM 1 PUT THAT DATA IN CONTEST.

11:02AM 2 THE COURT: IS THERE SOME DATA FROM LIS THAT EXISTS
11:02AM 3 THAT RELATES TO CMS, THOUGH? I THOUGHT I READ SOMETHING THAT
11:02AM 4 SAID THAT THERE IS SOME DATA FROM THE LIS THAT EXISTS AND
11:03AM 5 PERHAPS THAT'S RELEVANT TO THE CMS?

11:03AM 6 MS. SAHARIA: WELL, THERE IS SOME DATA FROM CMS THAT
11:03AM 7 WAS PRODUCED -- EXCUSE ME, FROM LIS THAT WAS PRODUCED OVER THE
11:03AM 8 COURSE OF THE GOVERNMENT'S INVESTIGATION IN RESPONSE TO
11:03AM 9 SPECIFIC REQUESTS FOR SPECIFIC KINDS OF INFORMATION, BUT IT'S
11:03AM 10 NOT THE FULL RANGE OF DATA.

11:03AM 11 NOW, I THINK WHAT YOUR HONOR MIGHT BE THINKING OF IS THAT
11:03AM 12 THE GOVERNMENT HAS REPEATEDLY REFERRED TO POTENTIAL TESTIMONY
11:03AM 13 FROM THERANOS'S LAB DIRECTOR IN 2016. HIS NAME IS MR. DAS WHO
11:03AM 14 THEY WANT TO TESTIFY ABOUT VARIOUS ANALYSES THAT HE PERFORMED
11:03AM 15 FOLLOWING THE CMS REPORT, AND, OF COURSE, THOSE WOULD HAVE BEEN
11:03AM 16 PERFORMED USING DATA FROM THE LIS.

11:03AM 17 HOW ARE WE SUPPOSED TO CONFRONT HIS RECOLLECTION OF WHAT
11:03AM 18 ANALYSES HE PERFORMED OR TEST THE RELIABILITY OF HIS ANALYSES
11:04AM 19 WITHOUT ACCESS TO THE ACTUAL DATA ON WHICH HE BASED THOSE
11:04AM 20 ANALYSES?

11:04AM 21 THE LOSS OF THE LIS DATA IS QUITE EQUIVOCAL TO CONFRONTING
11:04AM 22 THAT KIND OF TESTIMONY THAT THEY WANT TO PUT AT ISSUE. AND
11:04AM 23 SIMILARLY WITH THE TESTIMONY OF DR. MASTER, IN HIS SUPPLEMENTAL
11:04AM 24 REPORT HE CONDUCTS VARIOUS CALCULATIONS THAT USES INPUT, OTHER
11:04AM 25 CALCULATIONS PERFORMED BY UNIDENTIFIED THERANOS WITNESSES THAT

11:04AM 1 THEY DID WITH THE LIS DATA. SO HE'S NOW TWO OR THREE STEPS
11:04AM 2 REMOVED FROM THE LIS DATA PERFORMING CALCULATIONS, AND WITHOUT
11:04AM 3 ACCESS TO THE LIS DATA, IT'S UNCLEAR HOW WE CAN TEST THE
11:04AM 4 RELIABILITY OF THOSE CALCULATIONS.

11:04AM 5 SO THERE ARE ALL SORTS OF WAYS IN WHICH OUR LACK OF ACCESS
11:04AM 6 TO THE LIS DATA BOTH DEPRIVES US OF THE MOST CRITICAL
11:04AM 7 EXCULPATORY EVIDENCE IN THE CASE AND HINDERS OUR ABILITY TO
11:04AM 8 CONFRONT THE GOVERNMENT'S WITNESSES, TO CONFRONT THE
11:04AM 9 GOVERNMENT'S EVIDENCE.

11:04AM 10 AND THEN WHAT IS ONE FINAL POINT WITH RESPECT TO THE
11:05AM 11 PREJUDICE, AND I THINK THIS TOUCHES ON YOUR HONOR'S QUESTION
11:05AM 12 ABOUT, YOU KNOW, KIND OF HOW THIS COULD PLAY OUT AT TRIAL. YOU
11:05AM 13 KNOW, JUDGE KENNEDY RECOGNIZED IN LOUD HAWK THE VERY SEVERE
11:05AM 14 PREJUDICE THAT CAN ACCRUE WHEN THIS KIND OF -- EVIDENCE ABOUT
11:05AM 15 LOSS OF DATA OR LOSS OF EVIDENCE IS PRESENTED TO A JURY.

11:05AM 16 NO MATTER HOW CLEAR IT IS, AND WE THINK IT'S CRYSTAL CLEAR
11:05AM 17 THAT MS. HOLMES HAD NO ROLE IN THESE EVENTS, THERE IS A SEVERE
11:05AM 18 RISK OF PREJUDICE TO MS. HOLMES IF WE HAVE TO LITIGATE THESE
11:05AM 19 FACTS ABOUT WHO LOST THE DATA IN FRONT OF THE JURY. THE JURY
11:05AM 20 MAY WELL SPECULATE ABOUT THE INTENTIONS OF THERANOS'S EMPLOYEES
11:05AM 21 WITHOUT A PROPER BASIS FOR DOING SO, OR GOD FORBID, THEY MAY
11:05AM 22 INFER THAT MS. HOLMES HAD SOMETHING TO DO WITH IT, EVEN THOUGH
11:05AM 23 SHE DIDN'T, PERHAPS BECAUSE THE GOVERNMENT KEEPS TRYING TO
11:06AM 24 INSINUATE THAT WITHOUT ANY FACTUAL BASIS FOR DOING THAT.

11:06AM 25 IT WOULD BE VERY PREJUDICIAL FOR US TO HAVE TO LITIGATE

11:06AM 1 THESE ISSUES IN FRONT OF THE JURY, AND THAT'S WHY WE THINK THE
11:06AM 2 APPROPRIATE COURSE IS FOR THE COURT TO HOLD AN EVIDENTIARY
11:06AM 3 HEARING BEFORE TRIAL OUTSIDE OF THE JURY'S PRESENCE WHERE WE
11:06AM 4 CAN DEVELOP THESE FACTS, AND THEN THE COURT CAN DETERMINE WITH
11:06AM 5 ALL OF THE FACTS BEFORE IT, WHICH ARE NOT YET BEFORE THE COURT,
11:06AM 6 WHAT THE APPROPRIATE REMEDY WOULD BE.

11:06AM 7 THE COURT: SO WE TALKED ABOUT THIS IN THE IN LIMINE
11:06AM 8 MOTIONS, DIDN'T WE? AND I THINK IN MY RULING ON THIS
11:06AM 9 PARTICULAR IN LIMINE MOTION THE COURT DEFERRED IT DEPENDENT ON
11:06AM 10 WHETHER OR NOT THE DEFENSE WAS GOING TO INTRODUCE THIS IN YOUR
11:06AM 11 CASE-IN-CHIEF. YOU MIGHT DECIDE TO -- AND I THINK I MENTIONED
11:06AM 12 OPENING THE DOOR. IF YOU DECIDE TO BLAME THE GOVERNMENT FOR
11:06AM 13 THIS AND VIS-A-VIS THE GOVERNMENT THE SAME THING, AND THAT'S A
11:07AM 14 QUESTION, ISN'T IT? IT'S STILL AN OPEN ENDED QUESTION AS TO IF
11:07AM 15 LIS IS GOING TO COME IN AT ALL.

11:07AM 16 IF IT DOESN'T COME IN, THEN WHAT YOU HAVE, AS I SUGGESTED
11:07AM 17 EARLIER, IS YOUR BATTLE OF ANECDOTAL DOCTORS TALKING ABOUT THE
11:07AM 18 ANECDOTAL INFORMATION, AND THE JURY CAN THEN DECIDE JUST BASED
11:07AM 19 ON THAT INFORMATION AT LEAST FOR WHATEVER ISSUE IT PRESENTS.

11:07AM 20 SO IF THE LIS DOESN'T COME IN, IT SEEMS LIKE YOU'RE ON
11:07AM 21 EVEN GROUND.

11:07AM 22 MS. SAHARIA: WELL, I RESPECTFULLY DISAGREE BECAUSE
11:07AM 23 THE GOVERNMENT WANTS TO PRESENT EVIDENCE ALL OF WHICH TIES BACK
11:07AM 24 TO THE LIST. THEY WANT TO PRESENT THE EVIDENCE OF DR. MASTER
11:07AM 25 THAT TIES BACK TO THE LIST. THEY WANT TO PRESENT THE EVIDENCE

1 OF DR. DAS, A THERANOS EMPLOYEE THAT TIES BACK TO THE LIS.

2 THEY WANT TO PRESENT THESE ANECDOTES THAT WE CAN'T, WE CAN'T

3 FULLY CONFRONT THE ANECDOTES WITHOUT KNOWING THE INFORMATION

4 ABOUT THEM IN THE LIS.

5 SO I DON'T THINK THAT WE'RE ON AN EVEN PLAYING FIELD JUST

6 BECAUSE BOTH PARTIES LACK ACCESS TO THE LIS.

7 NOW, THE COURT DID RECOGNIZE IN ITS RULING A COUPLE OF

8 THINGS THAT I THINK ARE RELEVANT TO THIS DISCUSSION.

9 YOU'RE ABSOLUTELY RIGHT THAT THE COURT DID NOTE THAT THE

10 DEFENSE MIGHT DECIDE TO PUT THE BLAME FOR THE LOSS OF THE

11 EVIDENCE AT ISSUE. THAT, OF COURSE, IS A JUDGMENT CALL THAT WE

12 HAVEN'T MADE, AND I THINK OUR PREFERENCE IS TO AVOID THIS

13 ENTIRE SIDESHOW AT TRIAL, BUT I DO THINK THAT THAT HIGHLIGHTS

14 THE IMPORTANCE OF OUR MOTION TO COMPEL. THE INFORMATION IN THE

15 GOVERNMENT'S BRADY LETTER THAT HAS STILL NOT BEEN PRODUCED TO

16 US, WHICH, NAMELY, ARE THE DOCUMENTS THAT UNDERLIE THAT BRADY

17 LETTER THAT THE GOVERNMENT REFUSES TO PRODUCE AND EVEN THE

18 IDENTITIES OF THE PEOPLE NAMED IN THE BRADY LETTER, HOW CAN WE

19 EXERCISE A JUDGMENT ABOUT WHETHER OR NOT TO PRODUCE EVIDENCE AT

20 TRIAL OR TO CALL WITNESSES ON THIS ISSUE IF THE GOVERNMENT

21 REFUSES TO TELL US WHO THE WITNESS ARE AND REFUSES TO ACTUALLY

22 GIVE US THE EVIDENCE?

23 SO I DO THINK THAT THAT ISSUE HIGHLIGHTS WHY THE COURT

24 SHOULD GRANT THE MOTION TO COMPEL, WHETHER OR NOT THE COURT

25 EVEN HOLDS A HEARING, WE THINK THAT MOTION TO COMPEL IS

11:09AM 1 RELEVANT TO TRIAL.

11:09AM 2 NOW, THE COURT DID SEPARATELY NOTE, APPROPRIATELY SO, THAT
11:09AM 3 WE ARE ENTITLED TO HOLD THE GOVERNMENT TO ITS BURDEN AT TRIAL.
11:09AM 4 WE, OF COURSE, HAVE THE FULL CAPABILITY TO ARGUE THAT THEY HAVE
11:09AM 5 FAILED TO MEET THAT BURDEN BECAUSE THEY'VE PRESENTED AN
11:09AM 6 ANECDOTAL CASE THAT IS LACKING IN DATA. I THINK IT'S
11:09AM 7 INEVITABLE THAT THE JURY WILL HEAR THAT THERE WAS SUCH A
11:09AM 8 DATABASE, THAT THERE WAS AN LIS DATABASE, AND THE JURY WILL NO
11:09AM 9 DOUBT APPRECIATE THAT THE DATABASE IS NOT BEFORE THEM. AND I
11:09AM 10 THINK IT IS APPROPRIATE FOR THE DEFENSE, YOU KNOW, WHETHER OR
11:10AM 11 NOT EVIDENCE IS SUPPRESSED, I THINK IT'S APPROPRIATE FOR THE
11:10AM 12 DEFENSE TO HOLD THE GOVERNMENT TO ITS BURDEN BY ARGUING TO THE
11:10AM 13 JURY THAT THE DATA IS NOT BEFORE THE JURY, AND THE GOVERNMENT
11:10AM 14 HAS NOT PRESENTED THAT DATA TO THE JURY WITHOUT BLAMING ANYONE
11:10AM 15 FOR WHY IT'S -- THE GOVERNMENT IS NOT PRESENTING THAT DATA TO
11:10AM 16 THE JURY. I THINK THE DEFENSE HAS TO BE ABLE TO MAKE THAT
11:10AM 17 ARGUMENT.

11:10AM 18 BUT AGAIN, I THINK THE FACT THAT THAT ARGUMENT IS
11:10AM 19 CRITICALLY AN IMPORTANT ARGUMENT TO THE DEFENSE JUST HIGHLIGHTS
11:10AM 20 THAT THE REAL DANGER THAT THE JURY WILL SPECULATE AND DRAW
11:10AM 21 INCORRECT INFERENCES FROM THE LACK OF DATA, WHICH IS WHY WE
11:10AM 22 THINK THE ONLY APPROPRIATE REMEDY FOLLOWING A HEARING WOULD BE
11:10AM 23 A SUPPRESSION.

11:10AM 24 THE COURT: OKAY. THANK YOU VERY MUCH, MS. SAHARIA.

11:10AM 25 MS. SAHARIA: THANK YOU, YOUR HONOR.

11:10AM 1 THE COURT: YOU'RE WELCOME.

11:10AM 2 MR. WADE: YOUR HONOR, I APOLOGIZE. THIS WOULD BE
11:10AM 3 ONE OF THOSE MOMENTS WHERE IN A CONVENTIONAL HEARING I WOULD
11:10AM 4 PASS MS. SAHARIA A NOTE.

11:11AM 5 BUT WITH RESPECT TO THE PRIVILEGE ISSUE THAT WAS RAISED,
11:11AM 6 IF I MIGHT ADDRESS THAT JUST VERY -- FOR 30 SECONDS? AND THAT
11:11AM 7 IS JUST TO SAY MS. SAHARIA WAS NOT INVOLVED, I THINK, IN THE
11:11AM 8 REPRESENTATION DURING THIS TIME PERIOD BETWEEN THE INDICTMENT
11:11AM 9 AND THE SO-CALLED "DECOMMISSIONING OF THE LIS" OR IN OTHER
11:11AM 10 WORDS PUTTING THE LIS IN THE STORAGE FACILITY, WHICH IS HOW I
11:11AM 11 WOULD REFER TO IT.

11:11AM 12 TO THE EXTENT THAT THE COURT HAS INQUIRIES WITH RESPECT TO
11:11AM 13 MS. HOLMES'S KNOWLEDGE OF AND ACCESS TO THAT DATA AND HER
11:11AM 14 PARTICIPATION IN SUBPOENA COMPLIANCE OR LACK THEREOF GIVEN HER
11:11AM 15 STATUS IN THE INVESTIGATION, WE WOULD BE HAPPY TO PROVIDE A
11:11AM 16 PROFFER TO THE COURT IN CAMERA EX PARTE ON THAT. I THINK IT
11:11AM 17 WOULD ADDRESS ANY OF THE COURT'S CONCERNS.

11:11AM 18 I DON'T THINK IT WOULD BE FAIR TO DRAW ANY ADVERSE
11:11AM 19 INFERENCE FROM MS. HOLMES NOT CURRENTLY POSSESSING THE LIS.
11:12AM 20 AND IF THE COURT WERE INTENDING TO DO THAT, WE WOULD REQUEST
11:12AM 21 THE OPPORTUNITY TO JUST ADDRESS THAT BECAUSE I THINK AN
11:12AM 22 EX PARTE HEARING WHERE WE EXCHANGE FOR TWO MINUTES ON THE
11:12AM 23 PRIVILEGE ISSUES WOULD MORE THAN ADDRESS THE COURT'S CONCERN.

11:12AM 24 THE COURT: WELL, THANK YOU. I WAS NOT INTENDING --
11:12AM 25 IT WAS NOT MY INTENT TO BROACH A PRIVILEGE TOPIC.

11:12AM 1 AND, MS. SAHARIA, PLEASE KNOW THAT, THAT WAS NOT MY
11:12AM 2 INTENT, NOR, MR. WADE, THAT WAS NOT MY INTENT. I WAS JUST
11:12AM 3 TRYING TO GET THE FACTUAL SCENARIO DOWN. THE DATES, THE
11:12AM 4 TIMELINE OF WHAT OCCURRED I THINK SPEAK PERHAPS SUFFICIENT
11:12AM 5 EVIDENCE FOR THE COURT TO CONSIDER THE MOTION HERE.

11:12AM 6 I THINK WE KNOW THAT THE EVIDENCE SHOWS THAT ON INDICTMENT
11:12AM 7 IT WAS JUNE 14TH OR JUNE 18TH, WHATEVER IT WAS, I THINK
11:12AM 8 MS. HOLMES STEPPED DOWN AS CEO. I THINK THERE IS INFORMATION
11:12AM 9 IN THE DOCUMENTS I'VE READ THAT SUGGESTS THAT SHE REMAINED AS
11:12AM 10 PRESIDENT OF THE BOARD, BUT SHE DID STEP DOWN AS CEO AT THE
11:13AM 11 TIME. I RECOGNIZE THAT.

11:13AM 12 MY QUESTION TO MS. SAHARIA WAS REGARDING -- I THINK IT WAS
11:13AM 13 THE PREJUDICE. THAT'S WHAT MOVED US TO THE PREJUDICE
11:13AM 14 CONVERSATION AROUND THE FACTS THAT AT THE TIME OF THE
11:13AM 15 DECOMMISSION. I WISH IT WAS AS SIMPLE AS JUST PUTTING IN
11:13AM 16 STORAGE BECAUSE, MR. WADE, WE COULD JUST GET IT OUT OF STORAGE
11:13AM 17 AND OPEN IT UP AND THAT WOULD RESOLVE ALL OF THIS, BUT
11:13AM 18 APPARENTLY IT'S NOT THAT EASY.

11:13AM 19 THE QUESTION WAS AT THE TIME THAT IT WAS DECOMMISSIONED
11:13AM 20 AND PRIOR TO THE DECOMMISSION, AS EARLY AS JUNE WHEN THERE WAS
11:13AM 21 NOTICE OF THE INDICTMENT, CERTAINLY THE IMPORTANCE OF THE LIS
11:13AM 22 WAS CERTAINLY KNOWN TO THE DEFENSE. AND FOR A PREJUDICE
11:13AM 23 ANALYSIS THE QUESTION WAS, WELL, THERE WAS PRIVACY THERE AND
11:13AM 24 DOESN'T THAT SUGGEST THAT, NOT FAULT, BUT THERE WAS AN
11:13AM 25 OPPORTUNITY TO PRESERVE WAS THE POINT THAT I WAS TRYING TO

11:14AM 1 MAKE. THAT'S IT.

11:14AM 2 BUT THANK YOU FOR YOUR -- I APPRECIATE THE OFFER ABOUT IN
11:14AM 3 CAMERA. I DON'T THINK IT'S NEEDED JUST NOW.

11:14AM 4 LET'S TURN TO THE GOVERNMENT.

11:14AM 5 MR. WADE: YOUR HONOR, IF I MIGHT JUST SO THE RECORD
11:14AM 6 IS CLEAR ON THIS POINT. I INFER FROM THE COURT'S COMMENT THAT
11:14AM 7 THERE IS AN INFERENCE THAT MS. HOLMES HAD ACCESS TO THE LIS
11:14AM 8 DURING THAT TIME PERIOD.

11:14AM 9 THE COURT: OH. NO. MR. WADE, THAT'S NOT WHAT I
11:14AM 10 SAID. MR. WADE, THAT'S NOT WHAT I SAID, SIR. THAT'S NOT WHAT
11:14AM 11 I SAID THAT SHE HAD ACCESS TO IT.

11:14AM 12 I WAS STATING THE FACTS THAT SHE WAS STILL AT THE TIME,
11:14AM 13 SHE WAS -- THE RECORD WILL REFLECT THAT SHE WAS CEO OR WHATEVER
11:14AM 14 SHE WAS.

11:14AM 15 YOU RECALL IN MY ORDER ON THE IN LIMINE MOTIONS, I THINK I
11:14AM 16 GRANTED YOUR RELIEF. I SAID THERE HAS TO BE A NEXUS, SOME TYPE
11:14AM 17 OF A SHOWING OF A CONNECTION TO YOUR CLIENT AND THE LIS, AND
11:14AM 18 THAT STILL HOLDS TRUE. SO I THINK THAT -- I HOPE THAT ANSWERS
11:14AM 19 YOUR QUESTION.

11:15AM 20 MR. BOSTIC.

11:15AM 21 MR. WADE: THANK YOU, YOUR HONOR.

11:15AM 22 MR. BOSTIC: THANK YOU, YOUR HONOR.

11:15AM 23 I'LL START WITH JUST A FEW OF THE RELEVANT FACTS, AND I
11:15AM 24 THINK THE COURT HAS HIT SOME OF THE KEY ISSUES HERE OR ALL OF
11:15AM 25 THE KEY ISSUES.

1 JUST SO WE'RE CLEAR ON THE TIMELINE, THE GRAND JURY
2 SUBPOENAED THE RESULTS FROM THE LABORATORY INFORMATION SYSTEM,
3 THE LIS, IN APRIL OF 2018. THAT SUBPOENA CALLED FOR THE ENTIRE
4 UNIVERSE OF LAB RESULTS FROM THE LIS. SO THAT REQUEST, THAT
5 SUBPOENA WAS PENDING AS TO THERANOS FROM APRIL 2018 GOING
6 FORWARD.

7 LATER AS A RESULT OF DISCUSSIONS BETWEEN GOVERNMENT
8 COUNSEL AND THERANOS COUNSEL, THE GOVERNMENT SERVED OR RATHER
9 THE GRAND JURY ISSUED ANOTHER SUBPOENA WHICH THE GOVERNMENT
10 SERVED REQUESTING A SOFT COPY OF THE DATABASE ITSELF. SO THE
11 DATABASE IN NATIVE FORM, ELECTRONIC FORM THAT WOULD HAVE
12 INCLUDED THAT SAME INFORMATION BUT WITH MORE CAPABILITY FOR
13 SORTING AND SEARCHING. SO THAT REQUEST WAS AT THE BEGINNING OF
14 THE JUNE, THAT SUBPOENA.

15 THE LIS COPY WAS PRODUCED TO THE GOVERNMENT MONTHS LATER,
16 AT THE END OF AUGUST 2018, SEVERAL MONTHS AFTER THE GOVERNMENT
17 SERVED THE SUBPOENA REQUESTING ALL RESULTS FROM THE LIS.

18 AROUND THAT SAME TIME THE GOVERNMENT WAS IN CONTACT WITH
19 THERANOS COUNSEL ABOUT OBTAINING SOME EXEMPLARS OF THERANOS
20 ANALYZERS, AND THE DEFENSE HIGHLIGHTED THIS I THINK IN AN
21 EFFORT TO SUGGEST THAT THE GOVERNMENT SHOULD HAVE OR A
22 REASONABLE PROSECUTOR WOULD HAVE TAKEN THE SAME APPROACH AS TO
23 THE SERVERS HOUSING THE LIS THAT IT DID AS TO THOSE THERANOS
24 ANALYZERS, BUT THIS IS APPLES AND ORANGES IN A WAY THAT I THINK
25 IS CLEAR.

11:16AM 1 IN COLLECTING INFORMATION FROM THERANOS IN THE FORM OF LAB
11:16AM 2 RESULTS OR EMAILS OR OTHER INTERNAL DOCUMENTS, WE'RE TALKING
11:16AM 3 ABOUT ELECTRONICALLY STORED INFORMATION, ESI, WHICH IS
11:17AM 4 SOMETHING THAT LAWYERS AND INVESTIGATORS DEAL WITH REGULARLY.
11:17AM 5 IN COLLECTING THAT INFORMATION THE TYPICAL APPROACH, OF COURSE,
11:17AM 6 IS NOT TO GO IN AND SEIZE THE PHYSICAL DEVICES THEMSELVES,
11:17AM 7 ESPECIALLY WHEN THE BUSINESS IS OPERATING AND THAT WOULD BE
11:17AM 8 DISRUPTIVE TO THAT BUSINESS.

11:17AM 9 SO IT'S VERY COMMON AND STANDARD FOR ESI PRODUCTION TO BE
11:17AM 10 HANDLED BY TRANSFERRING AN ELECTRONIC COPY OF THAT INFORMATION.
11:17AM 11 ESI CAN BE COPIED BY ITS VERY NATURE.

11:17AM 12 MOREOVER, WITH ALMOST ALL ESI, CERTAINLY ALL ESI THAT I'VE
11:17AM 13 HAD EXPERIENCE WITH OTHER THAN THIS DATABASE, MOVING THE
11:17AM 14 HARDWARE THAT CONTAINS THAT ESI DOESN'T DISRUPT OR DESTROY THE
11:17AM 15 ESI. AND THAT WAS PROVEN IN THIS CASE, THE ASSIGNEE, WHEN IT
11:17AM 16 TOOK OVER THERANOS'S ASSETS, DID SUCCESSFULLY OBTAIN A LARGE
11:17AM 17 AMOUNT OF THERANOS'S NON-LIS, ELECTRONICALLY STORED
11:17AM 18 INFORMATION.

11:17AM 19 SO THERE WAS NO NOTICE TO THE GOVERNMENT THAT THE
11:17AM 20 SHUDDERING OF THERANOS WOULD RESULT IN THE LOSS OF THIS
11:18AM 21 INFORMATION, JUST TO MAKE THAT CLEAR, AND I THINK THE COURT
11:18AM 22 NOTED THAT ALREADY.

11:18AM 23 IN CONTRAST, THE THERANOS ANALYZERS, THE EXEMPLARS OF THE
11:18AM 24 EDISON, THE DIFFERENT VERSIONS OF THE TSPU, THE GOVERNMENT
11:18AM 25 NEEDED TO OBTAIN THOSE FOR THE SAKE OF HAVING THOSE PIECES OF

1 EVIDENCE, THE PHYSICAL DEVICES THEMSELVES. THAT WASN'T TO
2 OBTAIN ESI STORED ON THOSE DEVICES. SO THAT EXPLAINS THE
3 DIFFERENT APPROACH.

4 THE ASSIGNEE WENT LIVE A COUPLE OF WEEKS AFTER THE COPY OF
5 THE LIS WAS PRODUCED TO THE GOVERNMENT. THE GOVERNMENT WAS
6 UNABLE TO ACCESS THE LIS OR AT LEAST THE COPY THAT IT OBTAINED,
7 AND AS A RESULT IT CONSULTED WITH THERANOS COUNSEL SHORTLY
8 AFTER OBTAINING IT, AND THEN LATER WITH ASSIGNEE COUNSEL TO TRY
9 TO GET HELP WITH ACCESSING THAT INFORMATION.

10 THOSE RESULTS OR THOSE EFFORTS WERE ULTIMATELY FUTILE.
11 AND THAT'S THE REAL POINT HERE THAT THE DEFENSE IS ATTEMPTING
12 TO, I THINK, INVITE THE COURT TO PENALIZE THE GOVERNMENT FOR
13 NOT GOING FURTHER DOWN ROADS THAT WOULD HAVE BEEN DEAD ENDS OR
14 ROADS THAT WERE INDICATING THAT THEY WERE DEAD ENDS, FIRST AS
15 TO THE COPY OF THE LIS THAT THE GOVERNMENT DID OBTAIN, AND,
16 SECOND, AS TO THE ORIGINAL VERSION OF THE LIS THAT WAS
17 DECOMMISSIONED OR REALLY IN EFFECT DESTROYED BY THERANOS IN
18 AUGUST 2018. SO I'LL TAKE THOSE TWO COPIES ONE AFTER THE OTHER
19 JUST TO MAKE SURE THAT WE'RE CLEAR ON HOW THOSE WERE DEAD ENDS.

20 AS TO THE GOVERNMENT COPY, SO THE GOVERNMENT ATTEMPTED TO
21 GAIN ACCESS TO THE LIS COPY THAT THERANOS GAVE IT WITHIN WEEKS.
22 THE GOVERNMENT SUBMITS THAT'S A REASONABLE TIME GIVEN THE
23 VOLUME OF EVIDENCE IN THIS CASE AND THE OTHER EVENTS THAT WERE
24 HAPPENING AT THAT TIME.

25 THAT COPY, HOWEVER, WAS DOUBLE ENCRYPTED, AND THE

1 GOVERNMENT WAS NOT INFORMED OF THAT ENCRYPTION STATUS OR OF THE
2 EXISTENCE OF A SECOND ENCRYPTION KEY THAT WOULD BE NEEDED IN
3 ORDER TO ACCESS THOSE FILES.

4 DESPITE THE FACT THAT IN ITS REQUEST TO THERANOS THE
5 GOVERNMENT HAD ASKED FOR NOT JUST THE DATABASE BUT ALSO
6 ANYTHING THAT WAS REQUIRED TO ACCESSING, INCLUDING ANY SOFTWARE
7 THAT WAS REQUIRED TO ACCESS IT.

8 THAT COPY OF THE LIS, THE COPY RECEIVED FROM THERANOS, HAS
9 ALSO, BY THE WAY, BEEN PRODUCED TO THE DEFENSE. SO THE DEFENSE
10 IN THIS CASE HAS THE SAME INFORMATION THAT THE GOVERNMENT HAS,
11 THE SAME VERSION OF THE LIS.

12 SO I'M CONFUSED TO HEAR THE DEFENSE COMPLAIN ABOUT THE
13 GOVERNMENT'S LACK OF EFFORTS TO ACCESS THAT DEVICE, THAT COPY,
14 BECAUSE THE DEFENSE HAS EQUIVALENT, IDENTICAL ACCESS TO THAT
15 SAME INFORMATION. AND IF IT WERE ACCESSIBLE, PRESUMABLY WE
16 WOULDN'T BE IN THIS SITUATION BECAUSE THE GOVERNMENT, OR EXCUSE
17 ME, THE DEFENSE WOULD HAVE GONE THROUGH THE EFFORTS THAT IT
18 WANTED THE GOVERNMENT TO GO THROUGH, OBTAINED ACCESS TO THAT
19 DATABASE, THAT COPY OF THE DATABASE, AND THUS THERE WOULD BE NO
20 PREJUDICE TO THE DEFENSE BECAUSE THE DEFENDANT WOULD HAVE
21 ACCESS TO IT.

22 THE FACT THAT THE DEFENSE APPARENTLY HAS BEEN EQUALLY
23 UNSUCCESSFUL IN ACCESSING THAT COPY OF THE DATABASE JUST PROVES
24 THAT THAT COPY ITSELF WAS A DEAD END. IT WAS NOT A VIABLE COPY
25 OF THE DATABASE. SO THERE'S REALLY NO POINT IN SCRUTINIZING

11:21AM 1 THE GOVERNMENT'S CONDUCT AS TO ITS EFFORTS TO ACCESS THAT COPY
11:21AM 2 BECAUSE IT'S ALL MOOT. NO PREJUDICE RESULTED FROM ANY LACK OF
11:21AM 3 EFFORT THERE, BECAUSE NO MATTER WHAT EFFORT WAS EXPENDED, THOSE
11:21AM 4 COPIES, THE COPY THAT WE HAVE, THE COPY THAT WE GAVE TO THE
11:21AM 5 DEFENSE, OUR UNDERSTANDING IS THAT THEY'RE JUST NOT VIABLE,
11:21AM 6 THEY CANNOT BE ACCESSED, ESPECIALLY WITHOUT THE SECOND
11:21AM 7 ENCRYPTION KEY THAT, YOU KNOW, FOR WHICH THERE'S NO TRACE.

11:21AM 8 LET ME MOVE TO THE ORIGINAL COPY THEN, THE COPY OF THE LIS
11:21AM 9 THAT THERANOS USED, THE COPY THAT WAS STORED AT THERANOS ON
11:21AM 10 HARDWARE, DISASSEMBLED BY THERANOS AFTER FOUR DAYS OF
11:22AM 11 PRODUCTION TO THE GOVERNMENT. AS GOOD AS CONTEMPORANEOUSLY,
11:22AM 12 I'M LEAVING A VERY NARROW WINDOW FOR THE GOVERNMENT TO
11:22AM 13 UNDERSTAND AND REALIZE THAT WHAT IT HAD WAS NOT VIABLE AND THEN
11:22AM 14 TAKE THE STEPS NEEDED TO ANTICIPATE, PREDICT, AND THEN PREVENT
11:22AM 15 THERANOS FROM DESTROYING OR DISABLING THE ORIGINAL VERSION OF
11:22AM 16 THE LIS. THAT'S A CRITICAL TIME PERIOD. AND I THINK THE COURT
11:22AM 17 IS RIGHT TO FOCUS ON THAT THREE- OR FOUR-DAY PERIOD AND ASK
11:22AM 18 WHAT WOULD WE EXPECT? WHAT SHOULD WE DEMAND THAT THE
11:22AM 19 GOVERNMENT HAD DONE DURING THAT NARROW TIME PERIOD?

11:22AM 20 BEFORE THERANOS TOOK THAT ACTION TO DECOMMISSION THE LIS,
11:22AM 21 THE EVIDENCE IN THE RECORD SHOWS THAT THERANOS EMPLOYEES KNEW
11:22AM 22 THAT SHUTTING DOWN THE DATABASE WOULD LIKELY BE A PERMANENT
11:22AM 23 MOVE. THEY WENT FORWARD ANYHOW.

11:22AM 24 THE ASSIGNEE TOOK OVER THERANOS'S ASSETS A COUPLE OF WEEKS
11:22AM 25 LATER. THE GOVERNMENT IS AWARE AND HAS SHARED THIS INFORMATION

1 WITH THE DEFENSE THAT BY MID SEPTEMBER THE ASSIGNEE WAS
2 INVESTIGATING THE LIS PARTLY IN RESPONSE TO REQUESTS FROM
3 PLAINTIFFS IN CIVIL CASES. AND THE ASSIGNEE, DESPITE ITS
4 EFFORTS IN COORDINATING WITH THERANOS COUNSEL, CONTINUED TO BE
5 UNABLE TO GAIN ANY REAL OR MEANINGFUL ACCESS TO THAT LIS
6 INFORMATION.

7 BY MID OCTOBER THERANOS OUTSIDE COUNSEL AT WILMER HALE
8 CONFIRMED FOR THE ASSIGNEE THAT THEY COULDN'T ACCESS THE LIS
9 BECAUSE IT WAS DOUBLE ENCRYPTED. SO WE KEEP COMING BACK TO
10 THIS ISSUE JUST LIKE THE COPY PRODUCED TO THE GOVERNMENT, THE
11 ORIGINAL COPY WAS DOUBLE ENCRYPTED, REQUIRED THIS PARTICULAR
12 ENCRYPTION KEY IN ORDER TO GAIN ACCESS, AND IT'S UNKNOWN WHERE
13 THAT KEY WAS, WHETHER IT HAD BEEN LOST ENTIRELY. SO IT'S
14 COMPLETELY SPECULATIVE TO GUESS OR SUGGEST THAT EFFORTS BY THE
15 GOVERNMENT TARGETED AT THAT ORIGINAL COPY, THAT ORIGINAL
16 HARDWARE, WOULD HAVE PRODUCED ANY RESULTS.

17 THE DEFENSE REFERENCES WITNESS STATEMENTS SPECULATING THAT
18 THAT ORIGINAL COPY COULD HAVE BEEN RESURRECTED. BUT IF THE
19 COURT LOOKS AT THOSE STATEMENTS, I THINK THE COURT WILL SEE
20 THAT THEY DON'T OR DON'T MERIT MUCH WEIGHT.

21 FIRST, NONE OF THOSE STATEMENTS ADDRESS THE NEED FOR THE
22 ENCRYPTION KEY AND THE DOUBLE ENCRYPTED STATUS OF THAT
23 DATABASE. TO THE EXTENT THAT A WITNESS THOUGHT THAT THE
24 DATABASE MIGHT BE ABLE TO BE RESURRECTED, IT DOES NOT ACCOUNT
25 FOR AND DOESN'T PROVIDE A SOLUTION FOR THAT DOUBLE ENCRYPTED

11:24AM 1 STATUS.

11:24AM 2 ONE OF THE STATEMENTS THAT DEFENDANTS OR THE DEFENDANT
11:24AM 3 RELIES ON IS FROM A LAWYER WHO IN THAT SAME PROFFER TO THE
11:24AM 4 GOVERNMENT ADMITTED THAT HE DIDN'T HAVE A STRONG TECHNICAL
11:24AM 5 BACKGROUND, SO HE WAS JUST GIVING INFORMATION BASED ON HIS
11:24AM 6 UNDERSTANDING AT THE TIME, NOT TRYING TO ACT AS AN EXPERT TO
11:24AM 7 EXPLAIN WHAT WAS ACTUALLY POSSIBLE.

11:24AM 8 AS TO THE OTHER INDIVIDUALS WHO HAVE SOME MORE TECHNICAL
11:24AM 9 QUALIFICATIONS, ONE SAID HE DIDN'T THINK IT WOULD BE DIFFICULT
11:25AM 10 AT THE TIME THAT THE DATABASE WAS SHUT DOWN, BUT DIDN'T REALLY
11:25AM 11 PROVIDE AN OPINION THAT IT COULD HAVE BEEN RECONSTRUCTED
11:25AM 12 AFTERWARDS OR DIDN'T PROVIDE A CONTEMPORANEOUS OPINION AS OF
11:25AM 13 TODAY THAT HE THOUGHT IT REMAINED VIABLE AFTER IT WAS
11:25AM 14 DECOMMISSIONED.

11:25AM 15 ANOTHER SAID THAT HE THOUGHT THAT REASSEMBLING THE
11:25AM 16 DATABASE WOULD BE VERY DIFFICULT, BUT AGAIN, HE ALSO
11:25AM 17 SPECIFICALLY SAID THAT IT WOULD BE IMPOSSIBLE WITHOUT THE
11:25AM 18 PRIVATE ENCRYPTION KEY. SO AGAIN, WE COME BACK TO THE
11:25AM 19 ENCRYPTION KEY THAT WAS NEVER PROVIDED TO THE GOVERNMENT AND OF
11:25AM 20 WHICH THE GOVERNMENT WAS NOT EVEN INFORMED.

11:25AM 21 SO THANKS TO THERANOS'S ACTIONS, THANKS TO THE ACTIONS OF
11:25AM 22 DEFENDANT'S COMPANY, THE ORIGINAL COPY OF THE LIS TURNED INTO A
11:25AM 23 DEAD END. THANKS TO THE FORMAT IN WHICH IT WAS PRODUCED TO THE
11:25AM 24 GOVERNMENT, AND THE LACK OF THE COMPANY INFORMATION, THAT COPY
11:25AM 25 OF THE LIS WAS A DEAD END AS WELL. THAT'S WHY WE'RE IN THIS

11:25AM 1 SITUATION.

11:25AM 2 SO TO SAY TO THE COURT, WELL, WE NEED TO DELVE FURTHER
11:26AM 3 INTO THE GOVERNMENT'S ACTIONS PURSUING THOSE TWO DEAD ENDS
11:26AM 4 DOESN'T MAKE SENSE, IT'S NOT RELEVANT TO THE INQUIRY, IT HAS NO
11:26AM 5 EFFECT ON THE PREJUDICE TO THE DEFENDANT, THE ALLEGED
11:26AM 6 PREJUDICE, AND WE SUBMIT IT WOULD BE A WASTE OF TIME.

11:26AM 7 THE COURT: ALL RIGHT. DO YOU WANT TO SPEAK TO THE
11:26AM 8 BRADY ISSUE?

11:26AM 9 MR. BOSTIC: YES, YOUR HONOR, I'M HAPPY TO COVER THE
11:26AM 10 BRADY ISSUE.

11:26AM 11 SO HERE THERE'S SOME TENSION IN THE DEFENDANT'S POSITION,
11:26AM 12 AND, FRANKLY, THE IDEA THAT ON THE ONE HAND THE DEFENSE IS
11:26AM 13 ATTEMPTING TO USE THE FULSOMENESS OF THE GOVERNMENT'S
11:26AM 14 DISCLOSURE AS A CONCESSION AS AN ADMISSION OF WRONGDOING WHILE
11:26AM 15 ON THE OTHER HAND SAYING WE NEED MORE INFORMATION, THE COURT
11:26AM 16 SHOULD ORDER THAT THE GOVERNMENT NEEDS TO OPEN ITS FILES TO THE
11:26AM 17 DEFENSE SO THAT THE DEFENSE CAN PERUSE AND LOOK FOR ADDITIONAL
11:26AM 18 INFORMATION THAT MIGHT BE HELPFUL ON THIS ISSUE I THINK SHOULD
11:27AM 19 RAISE SOME CONCERNS WITH THE COURT.

11:27AM 20 THE GOVERNMENT HAS EXCEEDED ITS OBLIGATIONS IN THIS CASE
11:27AM 21 BY PROVIDING A VERY THOROUGH WRITTEN DISCLOSURE TO THE DEFENSE.
11:27AM 22 ADDITIONAL FACTS ARE -- THE UNDERLYING INFORMATION, UNDERLYING
11:27AM 23 THAT LETTER AND THE INTERNAL GOVERNMENT COMMUNICATIONS
11:27AM 24 THEMSELVES CERTAINLY ARE NOT RELEVANT OR HELPFUL TO THE DEFENSE
11:27AM 25 UNLESS THE COURT FINDS THAT THERE ARE DISPUTED ISSUES HERE TO

11:27AM 1 BE DECIDED, AND THE GOVERNMENT SUBMITS THAT THERE ARE NOT.

11:27AM 2 THE UNDISPUTED FACTS HERE ARE SUFFICIENT TO ESTABLISH THAT
11:27AM 3 THE DEFENDANT'S CLAIM CANNOT PROCEED, THAT THE DEFENDANT'S
11:27AM 4 REQUEST FOR THE SUPPRESSION MUST FAIL, AND THAT THERE'S NO NEED
11:27AM 5 FOR AN EVIDENTIARY HEARING.

11:27AM 6 AND WITH THE COURT'S PERMISSION, I WOULD LIKE TO HIGHLIGHT
11:27AM 7 SOME OF THE CASE LAW THAT I THINK ESTABLISHES THAT.

11:27AM 8 THE COURT: SURE.

11:28AM 9 MR. BOSTIC: THE LOUD HAWK OPINION ITSELF SAYS THAT
11:28AM 10 SUPPRESSION IS APPROPRIATE UNDER SOME CIRCUMSTANCES WHEN THE
11:28AM 11 GOVERNMENT LOSES OR DESTROYS TANGIBLE EVIDENCE PRIOR TO TRIAL.

11:28AM 12 NOW, THAT'S IN THE COURT'S OPINION ITSELF, NOT IN
11:28AM 13 JUDGE KENNEDY'S CONCURRENCE, BUT IN THE COURT'S OPINION WHICH
11:28AM 14 IS NINTH CIRCUIT PRECEDENT.

11:28AM 15 IN THIS CASE, AS WE JUST DISCUSSED, THE EVIDENCE WAS
11:28AM 16 ACTUALLY MORE UNDER THE DEFENDANT'S CONTROL THAN THE
11:28AM 17 GOVERNMENT'S, AND I'M NOT RAISING THIS TO ASSIGN BLAME OR
11:28AM 18 INSINUATE WRONGDOING ON THE DEFENDANT'S PART.

11:28AM 19 THE POINT HERE IS ABOUT ACCESS AND PREJUDICE, AND IT'S
11:28AM 20 GOING TO BE IMPOSSIBLE FOR THE DEFENDANT TO SHOW THAT SHE WAS
11:28AM 21 PREJUDICED BY THE LOSS OF THIS INFORMATION WHEN DURING THE
11:28AM 22 RELEVANT TIME PERIOD THE INDIVIDUAL INVOLVED WHO ACTUALLY HAD
11:28AM 23 EASIER ACCESS TO IT THAN THE GOVERNMENT WAS DEFENDANT HERSELF.

11:28AM 24 SO WHEN THE GOVERNMENT'S INVESTIGATION BEGAN, WHEN THE
11:28AM 25 S.E.C. SERVED DOCUMENT PRESERVATION NOTICES ON THERANOS, WHEN

11:28AM 1 THE GOVERNMENT SERVED GRAND JURY SUBPOENAS ON THERANOS CALLING
11:29AM 2 FOR PORTIONS OF THE LIS AND THEN THE ENTIRE THING, AT THOSE
11:29AM 3 TIME PERIODS THIS WAS DEFENDANT'S COMPANY THAT SHE HAD FOUNDED
11:29AM 4 OF WHICH SHE SERVED AS THE CHIEF EXECUTIVE OF WHICH SHE WAS A
11:29AM 5 MAJOR SHAREHOLDER.

11:29AM 6 EVEN AFTER INDICTMENT WHEN THE LIS WAS PRODUCED TO THE
11:29AM 7 DEFENDANT, DEFENDANT -- OR EXCUSE ME, PRODUCED TO THE
11:29AM 8 GOVERNMENT, THE DEFENDANT REMAINS CHAIR OF THE BOARD OF THE
11:29AM 9 COMPANY AND WAS STILL CONNECTED TO THE COMPANY.

11:29AM 10 IN CONTRAST, THE GOVERNMENT'S ACCESS TO THE EVIDENCE HERE
11:29AM 11 WAS VIA GRAND JURY SUBPOENA WHERE THE GOVERNMENT WAS DEFENDED
11:29AM 12 ON COMPLIANCE OF THE DOCUMENT CUSTODIAN, THERANOS ITSELF, AND
11:29AM 13 THE GOVERNMENT UNDERSTOOD THAT IT WAS OBTAINING THAT COMPLIANCE
11:29AM 14 DURING THE RELEVANT TIME PERIOD. ONLY LATER DID IT BECOME
11:29AM 15 APPARENT THAT THE COPY THAT IT HAD OBTAINED FROM THERANOS WAS
11:29AM 16 NOT VIABLE.

11:29AM 17 UNDER THE CASE LAW THESE DISTINCTIONS MATTER. THE
11:29AM 18 DIFFERENCE BETWEEN CASES WHERE THE GOVERNMENT ACTUALLY
11:30AM 19 POSSESSED THE EVIDENCE THAT WAS LOST AND CASES WHERE IT'S
11:30AM 20 ALLEGED THAT THE GOVERNMENT FAILED TO COLLECT, THESE
11:30AM 21 DISTINCTIONS MATTER AND THEY SERVE TO DEFEAT DEFENDANT'S
11:30AM 22 REQUEST HERE.

11:30AM 23 IN FACT, IT'S CRITICAL THAT NO COURT CASE HAS EVEN APPLIED
11:30AM 24 LOUD HAWK TO A SIMILAR SITUATION INVOLVING A FAILURE TO
11:30AM 25 COLLECT, AT LEAST NO CASE CITED BY THE DEFENDANT AND NO CASE

11:30AM 1 THAT THE GOVERNMENT CAN LOCATE.

11:30AM 2 FLYER ITSELF DOES NOT ADDRESS WHETHER SANCTIONS LIKE
11:30AM 3 SUPPRESSION ARE APPROPRIATE WHEN LAW ENFORCEMENT FAILS TO
11:30AM 4 COLLECT EVIDENCE IN THE FIRST PLACE.

11:30AM 5 IN U.S. VERSUS BROWN, THAT'S A DISTRICT CASE CITED BY THE
11:30AM 6 GOVERNMENT IN ITS BRIEFS, THE COURT CITES FLYER BUT NOTES THE
11:30AM 7 LACK OF CASE LAW APPLYING THIS TEST IN SITUATIONS LIKE THIS AND
11:30AM 8 IN THE ABSENCE OF THAT SUPPORT DECLINES TO EVEN ENGAGE IN
11:30AM 9 LOUD HAWK BALANCING IN THE FIRST PLACE, AFTER, BY THE WAY,
11:30AM 10 FINDING THAT THE FAILURE TO COLLECT BODY WORN CAMERA FOOTAGE IN
11:31AM 11 THAT CASE WASN'T A DUE PROCESS VIOLATION BECAUSE THERE WAS NOT
11:31AM 12 BAD FAITH OR SHOWING OF EXCULPATORY VALUE.

11:31AM 13 IT'S ALSO IMPORTANT THAT SOME OF THE CASES IN THIS AREA
11:31AM 14 ARE FOCUSING ON THE NEED OR THE APPLICABILITY OF A JURY
11:31AM 15 INSTRUCTION REGARDING MISSING EVIDENCE. SO ZUNIGA-GARCIA,
11:31AM 16 THAT'S A CASE RELIED UPON BY THE DEFENSE, INVOLVING A TOOL HELD
11:31AM 17 BY THE DEFENDANT AND A LARGER SET OF TOOLS USED FOR ALLEGEDLY
11:31AM 18 MODIFYING A GAS TANK TO SMUGGLE DRUGS, THAT CASE PROVIDED
11:31AM 19 LITTLE ANALYSIS OVERALL, BUT IT'S IMPORTANT TO NOTE THAT IN
11:31AM 20 THAT CASE THE EVIDENCE WAS LOST OR DESTROYED WHILE HELD BY THE
11:31AM 21 GOVERNMENT UNLIKE THE FACTS OF THIS CASE. AND THAT CASE
11:31AM 22 INVOLVED A REMEDIAL JURY INSTRUCTION.

11:31AM 23 AND FOR CASES DEALING WITH REMEDIAL JURY INSTRUCTIONS, I
11:31AM 24 THINK IT'S IMPORTANT TO NOTE THAT THE NINTH CIRCUIT MODEL
11:31AM 25 INSTRUCTION, THAT'S MODEL INSTRUCTION 4.19 WHERE THE NOTES OF

11:32AM 1 THAT INSTRUCTION CITE THE LOUD HAWK CASE, THAT INSTRUCTION SAYS
11:32AM 2 IF YOU FIND THAT THE GOVERNMENT INTENTIONALLY DESTROYED OR
11:32AM 3 FAILED TO PRESERVE, AND INSERT DESCRIPTION OF EVIDENCE, THAT
11:32AM 4 THE GOVERNMENT KNEW OR SHOULD HAVE KNOWN WOULD BE EVIDENCE IN
11:32AM 5 THIS CASE, THEN THE JURY MAY INFER THAT THAT EVIDENCE WAS
11:32AM 6 UNFAVORABLE TO THE GOVERNMENT.

11:32AM 7 SO AGAIN, THIS IS THE NINTH CIRCUIT'S MODEL INSTRUCTION
11:32AM 8 ESSENTIALLY CODIFYING LOUD HAWK IN THE CONTEXT OF JURY
11:32AM 9 INSTRUCTIONS, AND IT'S EXPRESSLY WORDED IN THE CONTEXT OF CASES
11:32AM 10 WHERE THE GOVERNMENT INTENTIONALLY DESTROYING OR FAILING TO
11:32AM 11 PRESERVE EVIDENCE THAT IT KNOWS WOULD BE EXCULPATORY.

11:32AM 12 SO GIVEN THAT, AGAIN, AND THE LACK OF CASE LAW APPLYING
11:32AM 13 LOUD HAWK, LACK OF CASE LAW APPLYING THAT BALANCING TEST,
11:32AM 14 TWO CASES INVOLVING THE FAILURE TO COLLECT EVIDENCE, THERE ARE
11:32AM 15 SERIOUS QUESTIONS ABOUT WHETHER THAT TEST EVEN APPLIES IN THIS
11:32AM 16 SITUATION.

11:32AM 17 MARTINEZ VERSUS MARTINEZ, THAT'S A NINTH CIRCUIT CASE THAT
11:33AM 18 SAYS THAT THE FAILURE TO COLLECT POTENTIALLY USEFUL EVIDENCE
11:33AM 19 IS, QUOTE, "DISTINCTLY DIFFERENT" THAN A DESTRUCTION OF
11:33AM 20 EVIDENCE THAT IS ALREADY EXTANT.

11:33AM 21 SO, AGAIN, THE DEFENSE'S FAILURE TO CITE A CASE LIKE THIS
11:33AM 22 ONE WHERE THE COURT IMPOSED SANCTIONS WHERE THE GOVERNMENT DID
11:33AM 23 NOT DESTROY OR LOSE EVIDENCE I THINK IT REALLY MATTERS AND
11:33AM 24 WEAKENS THEIR CLAIM.

11:33AM 25 AND ALL THE MORE SO, NOT ONLY IS THERE NOT A CASE IMPOSING

11:33AM 1 SANCTIONS UNDER THOSE CIRCUMSTANCES, THERE CERTAINLY ISN'T A
11:33AM 2 CASE IMPOSING SANCTIONS WHERE THE GOVERNMENT ACTUALLY SOUGHT TO
11:33AM 3 OBTAIN THE EVIDENCE IN QUESTION WHERE THE GOVERNMENT WAS LED TO
11:33AM 4 BELIEVE THAT IT HAD OBTAINED THE EVIDENCE WHERE AT THE TIME THE
11:33AM 5 EVIDENCE WAS LOST, IT WAS ACTUALLY CONTROLLED BY THE DEFENDANT
11:33AM 6 OR PARTIES CONNECTED TO THE DEFENDANT RATHER THAN THE
11:33AM 7 GOVERNMENT, AND WHERE THE EVIDENCE WAS DESTROYED NOT BY THE
11:33AM 8 GOVERNMENT OR ITS AGENTS BUT BY INDIVIDUALS AFFILIATED WITH THE
11:34AM 9 DEFENDANT, THOSE FACTS PRESENT HERE TAKE THIS CASE SO FAR OUT
11:34AM 10 OF THE HEARTLAND OF AUTHORITY WHERE SANCTIONS LIKE THIS ARE
11:34AM 11 EVEN CONSIDERED OR IMPOSED THAT DEFENDANT'S REQUEST REALLY
11:34AM 12 REPRESENTS A SIGNIFICANT EXPANSION OF THE CASE LAW IN THIS
11:34AM 13 AREA.

11:34AM 14 AND GIVEN THE FACTS OF THIS CASE, THE GOVERNMENT WOULD
11:34AM 15 SUBMIT THAT THE FACTS SIMPLY ARE NOT COMPELLING ENOUGH TO
11:34AM 16 WARRANT THAT KIND OF EXPANSION EVEN IF ONE WERE SUPPORTED BY
11:34AM 17 THE LAW.

11:34AM 18 THE COURT: ALL RIGHT. THANK YOU, MR. BOSTIC.

11:34AM 19 ANYTHING FURTHER?

11:34AM 20 MR. BOSTIC: NO, YOUR HONOR.

11:34AM 21 I HAVE ADDITIONAL THOUGHTS ON BAD FAITH AND THE
11:34AM 22 EXCULPATORY NATURE OF THE EVIDENCE, BUT IF THE COURT IS --
11:34AM 23 FEELS THAT IT'S PREPARED ON THOSE ISSUES, THEN I'M HAPPY TO
11:34AM 24 SUBMIT.

11:34AM 25 THE COURT: WELL, WHY DON'T YOU STATE IT FOR THE

11:34AM 1 RECORD. WHY DON'T YOU -- I'LL LET YOU GO FORWARD AND TELL ME
11:34AM 2 YOUR THOUGHTS ON THOSE TWO TOPICS IF YOU WISH.

11:34AM 3 MR. BOSTIC: THANK YOU, YOUR HONOR. JUST VERY
11:35AM 4 BRIEFLY.

11:35AM 5 ON THE BAD FAITH ISSUE, AGAIN, THE LOUD HAWK OPINION OF
11:35AM 6 THE COURT DOES SAY THAT SUPPRESSION OF SECONDARY EVIDENCE IS
11:35AM 7 APPROPRIATE WHERE A DEFENDANT CAN SHOW BAD FAITH OR CONNIVANCE
11:35AM 8 ON THE PART OF THE GOVERNMENT.

11:35AM 9 THE CONCURRENCE BY JUDGE KENNEDY CONTAINS DICTA SAYING
11:35AM 10 THAT IN CASES OF SEVERE PREJUDICE, QUOTE, "SEVERE PREJUDICE,"
11:35AM 11 SUPPRESSION OR OTHER SANCTIONS CAN BE APPROPRIATE WITHOUT
11:35AM 12 REGARD TO GOOD FAITH OR CULPABILITY OF THE GOVERNMENT.

11:35AM 13 TWO POINTS ON THAT. FIRST, THIS IS NOT A CASE INVOLVING
11:35AM 14 SEVERE PREJUDICE. I'LL TALK ABOUT THAT BRIEFLY IN A MINUTE.
11:35AM 15 BUT MORE GENERALLY, WE SEE FROM THIS THAT THE DEFENSE'S
11:35AM 16 ARGUMENT REALLY RELIES ON CHERRY PICKING PHRASES LIKE THIS FROM
11:35AM 17 DICTA, BUT ALSO ASKING THE COURT TO IGNORE THE HOLDINGS OF
11:35AM 18 THESE CASES. THE HOLDINGS OF THESE CASES GENERALLY AND
11:35AM 19 CONSISTENTLY SHOW THAT THE BURDEN TO OBTAIN THIS KIND OF RELIEF
11:36AM 20 IS VERY HIGH AND THAT THE FOCUS OF THE COURT'S ANALYSIS IN
11:36AM 21 CASES LIKE THIS IS REALLY ON THE CULPABILITY AND THE BAD FAITH
11:36AM 22 OF GOVERNMENT ACTORS.

11:36AM 23 THE FLYER ITSELF, THE FLYER OPINION AFFIRMS THE DISTRICT
11:36AM 24 COURT'S FINDINGS REGARDING DUE PROCESS AND SUPPRESSION, SO
11:36AM 25 AFFIRMING THE DISTRICT COURT'S DECISION NOT TO FIND A DUE

11:36AM 1 PROCESS VIOLATION OR TO SUPPRESS EVIDENCE. AND IN FLYER THE
11:36AM 2 NINTH CIRCUIT NOTES IN BOTH OF THOSE CONTEXTS THE DISTRICT
11:36AM 3 COURT'S FINDING IS NO BAD FAITH BY THE GOVERNMENT. THAT'S A
11:36AM 4 CASE WHERE THE HARD DRIVE WAS MISHANDLED, BUT THE GOVERNMENT
11:36AM 5 DIDN'T INTENTIONALLY CORRUPT DATA.

11:36AM 6 SO, AGAIN, IN THAT CASE ALTHOUGH BAD FAITH MAY NOT BE AN
11:36AM 7 EXPLICIT REQUIREMENT, FLYER MAKES CLEAR THAT THE PRESENCE OR
11:36AM 8 ABSENCE OF BAD FAITH IS A CRITICAL DETERMINATION NOT JUST TO
11:36AM 9 THE DUE PROCESS QUESTION BUT ALSO TO THE QUESTION OF WHETHER
11:36AM 10 SANCTIONS ARE APPROPRIATE.

11:36AM 11 OTHER CASES ARE SIMILAR. U.S. VERSUS HENDRIX CITED BY THE
11:37AM 12 GOVERNMENT AND ALSO U.S. VERSUS ROBERTSON FOCUSSED ON THE
11:37AM 13 GOVERNMENT'S CONDUCT AND THE CULPABILITY OR LACK THEREOF OF THE
11:37AM 14 GOVERNMENT'S CONDUCT.

11:37AM 15 JUST VERY BRIEFLY HERE ON THE EXCULPATORY NATURE OR THE
11:37AM 16 ALLEGED EXCULPATORY NATURE OF THE DATA IN THE LIS. DEFENSE
11:37AM 17 COUNSEL SAID MULTIPLE TIMES THAT THIS WAS THE MOST CRITICAL
11:37AM 18 EVIDENCE IN THE CASE. THE GOVERNMENT ABSOLUTELY DISAGREES WITH
11:37AM 19 THAT, AND THAT'S NOT SUPPORTED BY THE EVIDENCE.

11:37AM 20 CERTAINLY THE GOVERNMENT DID NOT VIEW THIS AS THE MOST
11:37AM 21 CRITICAL EVIDENCE IN THE CASE AT THE TIME OF INDICTMENT. IF
11:37AM 22 THAT HAD BEEN THE CASE, OF COURSE THE GOVERNMENT WOULD HAVE
11:37AM 23 COLLECTED AND EXAMINED THAT EVIDENCE PRIOR TO CHARGING THE
11:37AM 24 CASE.

11:37AM 25 THIS CASE WAS CHARGED BASED ON THE OTHER EVIDENCE THAT

11:37AM 1 CONCLUSIVELY SHOWS THAT THERANOS'S TECHNOLOGY SUFFERED FROM
11:37AM 2 ACCURACY AND RELIABILITY PROBLEMS AS WELL AS THE WEALTH OF
11:37AM 3 EVIDENCE THAT ESTABLISHES THE INVESTOR FRAUD AS TO WHICH THE
11:37AM 4 LIS IS OF MINIMAL RELEVANCE.

11:37AM 5 SO I JUST WANT TO PUSH BACK ON THE DEFENSE'S
11:38AM 6 CHARACTERIZATION OF THIS AS THE UNDISPUTED MOST CRITICAL
11:38AM 7 EVIDENCE IN THE CASE. THAT'S SIMPLY NOT TRUE, AND THAT'S
11:38AM 8 PARTLY BECAUSE OF THE LIMITATIONS OF THE LIS AND WHAT IT COULD
11:38AM 9 NOT DO.

11:38AM 10 I BELIEVE THE DEFENSE CONCEDES THAT THE LIS WOULD NOT
11:38AM 11 ALLOW EITHER PARTY TO IDENTIFY ACCURATE OR INACCURATE RESULTS
11:38AM 12 SIMPLY BY LOOKING AT THOSE RESULTS. IT'S NOT THE CASE THAT WE
11:38AM 13 COULD OPEN IT UP AND SEE MILLIONS OF ENTRIES, ACCURATE ONES
11:38AM 14 HIGHLIGHTED IN GREEN AND INACCURATE ONES HIGHLIGHTED IN RED.

11:38AM 15 THE COURT HAS SEEN, I THINK, THAT THE WAY THAT WE SHOW AN
11:38AM 16 INDIVIDUAL RESULT IS INACCURATE IS BY COMPARING IT AGAINST
11:38AM 17 EITHER A REFERENCE TEST AT THE SAME TIME THAT INFORMATION WOULD
11:38AM 18 NOT HAVE BEEN INCLUDED IN THE LIS OR BY COMPARING A PATIENT'S
11:38AM 19 RESULT TO THE OTHER INFORMATION WE HAVE ABOUT THAT PATIENT'S
11:38AM 20 PRESENTATION. FOR EXAMPLE, IF SOMEONE TESTS NEGATIVE FOR
11:38AM 21 PREGNANCY BUT THEN ENDS UP CARRYING A FETUS TO TERM, WE HAVE A
11:39AM 22 CONFLICT THERE BETWEEN THE BLOOD TESTS RESULTS AND THE REALITY
11:39AM 23 OF THE PATIENT'S CONDITION. THAT KIND OF INFORMATION, THE
11:39AM 24 INFORMATION CONTAINED IN A PATIENT'S MEDICAL CHART, THE
11:39AM 25 INFORMATION THAT A DOCTOR CAN OBTAIN BY OBSERVING A PATIENT,

11:39AM 1 THAT INFORMATION IS NOT CONTAINED IN THE LIS, EITHER.

11:39AM 2 SO THE IDEA THAT THE LIS WOULD HAVE ENABLED THE PARTIES TO
11:39AM 3 DETERMINE AN OVERALL FAILURE RATE OR REACH A CONCLUSIVE
11:39AM 4 DETERMINATION ABOUT THERANOS'S OVERALL RELIABILITY IS SIMPLY
11:39AM 5 FALSE.

11:39AM 6 TO THE EXTENT THAT THE LIS WOULD HAVE BEEN USEFUL IN THIS
11:39AM 7 CASE, IT WOULD HAVE BEEN USEFUL CERTAINLY TO THE GOVERNMENT IN
11:39AM 8 CORROBORATING THE INFORMATION THAT THE GOVERNMENT INTENDS TO
11:39AM 9 PRESENT FROM WITNESSES, INCLUDING INDIVIDUAL PATIENTS AND
11:39AM 10 FORMER THERANOS EMPLOYEES WHO DID HAVE ACCESS TO THAT DATA, AND
11:39AM 11 IT'S FROM THOSE EMPLOYEES THAT WE KNOW THAT THE LIS DATA WOULD
11:40AM 12 NOT HAVE BEEN EXCULPATORY IN THIS CASE.

11:40AM 13 THE INDIVIDUALS AT THERANOS WHO WORKED WITH THAT DATA, THE
11:40AM 14 GOVERNMENT REGULATORS WHO HAD ACCESS TO SOME OF THAT DATA
11:40AM 15 CONCLUDED THAT THE DATA SHOWED SERIOUS AND GLOBAL PROBLEMS WITH
11:40AM 16 THERANOS'S ACCURACY AND RELIABILITY. THAT'S HOW WE KNOW THAT
11:40AM 17 WERE THIS EVIDENCE STILL AVAILABLE, WERE THE LIS STILL INTACT,
11:40AM 18 IT ACTUALLY WOULD HAVE BEEN INCULPATORY RATHER THAN
11:40AM 19 EXCULPATORY.

11:40AM 20 THE DEFENSE'S SPECULATION OR ASSUMPTIONS ABOUT WHAT MIGHT
11:40AM 21 HAVE BEEN POSSIBLE WERE THE DEFENSE TEAM ABLE TO ANALYZE THE
11:40AM 22 LIS DATA JUST CAN'T SUPPORT THE REQUEST UNDER THE CASE LAW.

11:40AM 23 WITH THAT THE GOVERNMENT WILL SUBMIT, YOUR HONOR.

11:40AM 24 THE COURT: ALL RIGHT. THANK YOU.

11:40AM 25 MS. SAHARIA?

11:40AM 1 MS. SAHARIA: YES. THANK YOU, YOUR HONOR.

11:40AM 2 LET ME COVER A FEW POINTS. FIRST, LET ME JUST RESPOND
11:40AM 3 BRIEFLY TO MR. BOSTIC'S DISCUSSION OF THE CASE LAW JUST TO GET
11:41AM 4 THAT OUT OF THE WAY.

11:41AM 5 I DON'T OFTEN DO THIS, ACCUSE OPPOSING COUNSEL OF
11:41AM 6 MISCHARACTERIZING THE CASE LAW, BUT MR. BOSTIC IS
11:41AM 7 MISCHARACTERIZING LOUD HAWK. I DON'T THINK HE'S DOING SO
11:41AM 8 INTENTIONALLY.

11:41AM 9 THE DISCUSSION OF REQUIRING BAD FAITH IS NOT THE OPINION
11:41AM 10 OF THE COURT, AND THAT'S CLEAR FROM THE OPENING, THE OPENING
11:41AM 11 DISCUSSION IN LOUD HAWK WHERE IT IDENTIFIED JUDGES WHO JOIN THE
11:41AM 12 OPINION. I'M JUST GOING TO READ IT TO THE COURT. "TRASK,
11:41AM 13 CIRCUIT JUDGE, FILES AN OPINION AND THE JUDGMENT OF THE COURT.
11:41AM 14 BROWNING, WRIGHT, CHOY, WALLACE,, ANDERSON, AND KENNEDY CONCUR
11:41AM 15 IN THE RESULT AND IN SECTIONS I, II, III, AND VI."

11:41AM 16 THE PART OF THE OPINION THAT MR. BOSTIC IS QUOTING TO THE
11:41AM 17 COURT IS SECTION IV OF THAT OPINION. IT IS NOT THE OPINION OF
11:41AM 18 THE COURT.

11:41AM 19 WE DIDN'T CITE THIS CASE TO THE COURT BECAUSE I THOUGHT
11:42AM 20 THAT IT WAS CRYSTAL CLEAR THAT JUDGE KENNEDY'S OPINION IS NOT
11:42AM 21 DICTA BUT IS CONTROLLING LAW IN THE NINTH CIRCUIT, BUT SINCE
11:42AM 22 THE GOVERNMENT APPARENTLY DISAGREES, I WOULD CITE THE COURT TO
11:42AM 23 THE UNITED STATES VERSUS SIVILLA, 714 F. 3D 1168, NINTH CIRCUIT
11:42AM 24 2013 IN WHICH THE NINTH CIRCUIT SAYS THAT JUDGE KENNEDY'S
11:42AM 25 CONCURRING OPINION IN LOUD HAWK IS CONTROLLING LAW OF THIS

11:42AM 1 CIRCUIT TO DETERMINE WHETHER GOVERNMENT LOSS OF EVIDENCE
11:42AM 2 WARRANTS SANCTIONS LESS THAN DISMISSAL.

11:42AM 3 IT'S NOT DICTA. THAT IS THE CONTROLLING LAW IN THIS
11:42AM 4 CIRCUIT, AND JUDGE TRASK'S DISCUSSION OF BAD FAITH IS NOT EVEN
11:42AM 5 THE OPINION OF THE COURT IN LOUD HAWK. SO JUST TO GET THAT OUT
11:42AM 6 OF THE WAY.

11:42AM 7 A FEW OTHER ISSUES WITH RESPECT TO THE CASE LAW. THE
11:42AM 8 GOVERNMENT RELIES VERY HEAVILY ON THE BROWN DISTRICT COURT CASE
11:42AM 9 FROM ANOTHER DISTRICT WHERE THE COURT SAID THAT A FAILURE TO
11:42AM 10 COLLECT EVIDENCE IS NOT ACTIONABLE UNDER LOUD HAWK, BUT THAT
11:43AM 11 COURT FAILED TO ACKNOWLEDGE THE LANGUAGE IN LOUD HAWK THAT
11:43AM 12 WHETHER THE EVIDENCE WAS IN THE GOVERNMENT'S CUSTODY IS JUST
11:43AM 13 ONE RELEVANT FACTOR.

11:43AM 14 LOUD HAWK DOES NOT MAKE THAT DISPOSITIVE. IT CLEARLY IS
11:43AM 15 JUST ONE FACTOR OUT OF MANY, AND THAT DISTRICT COURT FAILS TO
11:43AM 16 RECOGNIZE THAT LANGUAGE IN LOUD HAWK.

11:43AM 17 THAT CASE ALSO, BY THE WAY, DOESN'T EVEN REALLY INVOLVE
11:43AM 18 THE FAILURE TO COLLECT THE EVIDENCE SO MUCH AS A FAILURE TO
11:43AM 19 CREATE THE EVIDENCE. IT INVOLVES A SITUATION WHERE THE POLICE
11:43AM 20 OFFICERS WERE NOT WEARING THEIR BODY CAMS, AND THERE WAS NO
11:43AM 21 EVIDENCE TO EVEN BE COLLECTED. THERE WAS NO VIDEO. THE CLAIM
11:43AM 22 WAS JUST THAT THE POLICE OFFICERS HAD VIOLATED PROTOCOL BY
11:43AM 23 FAILING TO TURN ON THEIR VIDEO CAMS.

11:43AM 24 THE ZUNIGA-GARCIA CASE IS A LOUD HAWK CASE. IT'S CRYSTAL
11:43AM 25 CLEAR FROM THAT CASE THAT INTENT IS NOT REQUIRED UNDER

11:43AM 1 LOUD HAWK. AND, AGAIN, THE COURT OR THE GOVERNMENT CITED THE
11:43AM 2 MARTINEZ CASE FROM THE NINTH CIRCUIT. THAT IS NOT A LOUD HAWK
11:44AM 3 CASE, EITHER, AND THE CONTROLLING NINTH CIRCUIT CASE LAW UNDER
11:44AM 4 THE DUE PROCESS CLAIM AND WHETHER A FAILURE TO COLLECT CAN RISE
11:44AM 5 TO THE LEVEL OF A DUE PROCESS VIOLATION IS MILLER VERSUS
11:44AM 6 VASQUEZ, AND IT CLEARLY HOLDS THAT IT CAN.

11:44AM 7 SO THAT'S JUST TO RESPOND TO SOME OF THE CASE LAW.

11:44AM 8 NOW, WITH RESPECT TO THE EVIDENCE, MR. BOSTIC GAVE A VERY
11:44AM 9 NICE CLOSING ARGUMENT ABOUT WHAT FINDINGS OF FACT HE WOULD LIKE
11:44AM 10 THE COURT TO REACH AT THE CONCLUSION OF AN EVIDENTIARY HEARING,
11:44AM 11 BUT THAT'S WHY WE WOULD NEED A HEARING SO THE COURT CAN JUDGE
11:44AM 12 CREDIBILITY FOR ITSELF.

11:44AM 13 I THINK MR. BOSTIC URGED THE COURT TO REACH CREDIBILITY
11:44AM 14 DETERMINATIONS BASED ON 302 MEMOS FROM THE FBI. THAT'S CLEARLY
11:44AM 15 NOT APPROPRIATE. THE COURT NEEDS TO HEAR THE EVIDENCE LIVE AND
11:44AM 16 DETERMINE WHETHER THOSE WITNESSES ARE CREDIBLE, HEAR THEIR
11:44AM 17 TESTIMONY FIRSTHAND AND DETERMINE WHETHER MR. BOSTIC'S
11:45AM 18 REPRESENTATIONS THAT THESE ARE DEAD ENDS ARE REALLY ACCURATE.
11:45AM 19 WE JUST DON'T KNOW BECAUSE WE DON'T HAVE ALL OF THE EVIDENCE
11:45AM 20 BEFORE US.

11:45AM 21 THE COURT: WELL, MS. SAHARIA, LET ME ASK YOU, WHAT
11:45AM 22 -- IT SEEMS CLEAR THAT THERE'S NO DISPUTE THAT WHAT THE
11:45AM 23 GOVERNMENT HAS, WHAT THE GOVERNMENT WAS PROVIDED IS
11:45AM 24 INACCESSIBLE, AND IT WAS AT THE TIME THAT THEY RECEIVED IT
11:45AM 25 BECAUSE THEY DO NOT HAVE THE KEY. THE DOCUMENTS THAT YOU

1 SUPPLIED TO THE COURT, EXHIBITS AND THINGS, SHOW
2 CONTEMPORANEOUS EMAILS FROM WILMER AND OTHER PARTIES WHO WERE
3 IN CONTROL AT THE TIME, AT LEAST RECOGNITION THAT A KEY WAS
4 MISSING. THERE'S MENTION OF NAMES OF INDIVIDUALS WHO CREATED
5 THE LIS, INDIVIDUALS WHO MIGHT HAVE THE KEY, INDIVIDUALS WHO
6 WERE IN INDIA. I THINK I REFERENCED THOSE EARLIER.

7 BUT THERE'S NO DISPUTE, IS THERE, THAT THE GOVERNMENT HAD,
8 WHEN THEY RECEIVED THE LIS ON AUGUST 27, AND WHENEVER IT WAS,
9 2018, IT WAS A NONFUNCTIONING COPY? IT WAS SOMETHING THAT WAS
10 GIVEN TO THEM THAT THEY EITHER RECEIVED IN GOOD FAITH OR
11 WHATEVER, BUT WHATEVER THEY RECEIVED IT WAS -- THEY COULD NOT
12 ACCESS IT, AND THEY DID NOT KNOW THAT AT THE TIME.

13 IS THAT IN DISPUTE?

14 MS. SAHARIA: I DON'T DISPUTE THAT.

15 BUT WHAT I DO DISPUTE IS WHETHER -- HAD THE GOVERNMENT
16 ACTED PROMPTLY AND REASONABLY AS REASONABLE PROSECUTORS WOULD
17 HAVE DONE, WOULD THEY HAVE BEEN ABLE TO FIND THE INFORMATION
18 THEY NEEDED TO USE THE DATABASE COPY THAT THEY HAD?

19 NOW, IN MY OPENING PRESENTATION I NOTED FOR THE COURT THAT
20 IF YOU READ THE BRADY LETTER VERY CAREFULLY, IT APPEARS THAT
21 THE FIRST TIME THAT THE GOVERNMENT ASKED ANYONE FOR A PASSWORD
22 WAS A YEAR AND A HALF LATER, AND MR. BOSTIC DID NOT CHALLENGE
23 THAT IN HIS PRESENTATION. HE NOTES THAT THERE WERE DISCUSSIONS
24 ABOUT HOW THEY COULDN'T ACCESS THE LIS DATABASE OCCURRING IN
25 THE U.S. ATTORNEY'S OFFICE IN LATE 2018, AND THAT APPEARS TO BE

11:47AM 1 TRUE.

11:47AM 2 BUT AT THE TIME, IT APPEARS FROM THE BRADY LETTER, AND
11:47AM 3 AGAIN, I URGE THE COURT TO READ THOSE PARAGRAPHS VERY
11:47AM 4 CAREFULLY, THE PARALEGALS AND SUPPORT STAFF WERE TELLING THE
11:47AM 5 GOVERNMENT THAT THE DATABASE WAS TOO BIG AND THEY DIDN'T HAVE
11:47AM 6 THE RIGHT SOFTWARE TO ACCESS IT.

11:47AM 7 NOW, MIND YOU, THE GOVERNMENT HAD BEEN TOLD LONG AGO WHAT
11:47AM 8 SOFTWARE IT WOULD NEED TO ACCESS IT AND APPARENTLY IT DIDN'T
11:47AM 9 GET IT, BUT THAT'S WHAT THEY WERE TALKING ABOUT IN LATE 2018.

11:47AM 10 THERE'S NO DISCUSSION IN THE BRADY LETTER THAT THE
11:47AM 11 GOVERNMENT REALIZED IT NEEDED A PASSWORD, WHICH IT WOULD HAVE
11:47AM 12 DONE IF IT DILIGENTLY OPENED THE LIS DATABASE, AND WE CAN'T
11:47AM 13 KNOW UNTIL WE HAVE AN EVIDENTIARY HEARING WHETHER THEY COULD
11:48AM 14 HAVE OBTAINED THAT PASSWORD OR WHETHER THEY COULD HAVE RESTORED
11:48AM 15 THE PHYSICAL LIS DATABASE, AS WITNESSES HAVE SAID THEY COULD
11:48AM 16 HAVE, IF THEY HAD OBTAINED THE PHYSICAL HARDWARE FROM THE
11:48AM 17 ASSIGNEE. IT EXISTED.

11:48AM 18 IF THEY HAD ACTED PROMPTLY, THAT EQUIPMENT STILL EXISTED,
11:48AM 19 IT WAS WITH THE ASSIGNEE, THEY COULD HAVE COLLECTED IT. AND,
11:48AM 20 YOU KNOW, MR. BOSTIC POINTED OUT THAT COLLECTING PHYSICAL
11:48AM 21 ANALYZERS IS DIFFERENT THAN COLLECTING ESI AND THE TYPICAL
11:48AM 22 APPROACH TO COLLECTING ESI IS JUST TO, YOU KNOW, COLLECT A COPY
11:48AM 23 OF THE DATA.

11:48AM 24 THAT MIGHT BE SO IN THE ORDINARY CASE, BUT WE KNOW THIS IS
11:48AM 25 NOT AN ORDINARY CASE BECAUSE THE GOVERNMENT'S OWN EXPERTS,

11:48AM 1 THEIR OWN ESI EXPERTS RECOMMENDED TO THE GOVERNMENT THAT THEY
11:48AM 2 TAKE STEPS TO EITHER GIVE IT TO THE FBI TO OPEN OR TO GO GET
11:48AM 3 THE PHYSICAL EQUIPMENT. THEIR OWN EXPERTS TOLD THEM TO GO GET
11:48AM 4 THE PHYSICAL EQUIPMENT AND THEY DIDN'T DO IT.

11:48AM 5 THE COURT: OKAY. SO WOULD IT -- AS TO THE
11:49AM 6 DILIGENCE, AND I UNDERSTAND YOUR POINT ABOUT BEING CRITICAL OF
11:49AM 7 THE GOVERNMENT WAITING FOR A YEAR, 18 MONTHS, WHATEVER IT WAS
11:49AM 8 THAT THEY WAITED FOR. SO WOULD THEY HAVE BEEN DILIGENT IF THEY
11:49AM 9 TRIED TO OPEN IT IN FIVE DAYS AT THE TIME THAT THEY RECEIVED
11:49AM 10 IT? WOULD THAT HAVE BEEN DUE DILIGENCE?

11:49AM 11 MS. SAHARIA: WELL, PERHAPS, YOUR HONOR. I MEAN, I
11:49AM 12 WOULD HOPE THAT THEY WOULD TRY TO OPEN IT WITHIN A DAY OR TWO
11:49AM 13 OF RECEIVING IT. THAT'S WHAT I THINK MOST PEOPLE DO WHEN THEY
11:49AM 14 RECEIVE PRODUCTIONS. THEY DON'T SIT AROUND FOR FIVE DAYS,
11:49AM 15 ESPECIALLY WHEN THEY KNOW THAT THE PRODUCING COMPANY IS ABOUT
11:49AM 16 TO DISSOLVE. I MEAN, I THINK THAT DISTINGUISHES THIS CASE FROM
11:49AM 17 THE ORDINARY CASE.

11:49AM 18 THE COURT: BUT THEY DIDN'T KNOW. THEY DIDN'T KNOW
11:49AM 19 THAT THE DATABASE WOULD BE DECOMMISSIONED FOUR DAYS AFTER THEY
11:49AM 20 RECEIVED IT, THOUGH, DID THEY? IS THERE ANY DISPUTE ABOUT
11:49AM 21 THAT?

11:49AM 22 MS. SAHARIA: MR. BOSTIC HAS REPRESENTED ORALLY TO
11:49AM 23 THE COURT THAT FACT, AND I HAVE NO BASIS TO QUARREL WITH THAT
11:50AM 24 ORAL REPRESENTATION TO THE COURT THAT HE DIDN'T KNOW THAT AT
11:50AM 25 THE TIME.

11:50AM 1 THEY CERTAINLY KNEW THE COMPANY WAS CLOSING.

11:50AM 2 THE COURT: SURE. I DIDN'T SEE ANY DOCUMENTATION,
11:50AM 3 ANY EMAILS OR ANYTHING THAT PUT ANY PARTY ON NOTICE THAT THE
11:50AM 4 DATABASE WOULD BE DECOMMISSIONED WHEN IT WAS. I DIDN'T SEE
11:50AM 5 ANYTHING ABOUT THAT, NOR DID I SEE ANYTHING THAT GAVE
11:50AM 6 INFORMATION TO THE GOVERNMENT THAT WHAT THEY WERE GIVEN THEY
11:50AM 7 COULDN'T OPEN BECAUSE OF A LACK OF THIS KEY, I THINK THIS
11:50AM 8 PASSWORD KEY, THIS SECONDARY KEY THAT WAS NEEDED.

11:50AM 9 SO THEY WERE GIVEN SOMETHING AND IN ESSENCE FOUR DAYS
11:50AM 10 LATER IT -- THE LIS WAS -- THE ORIGINAL LIS WAS DESTROYED, AND
11:50AM 11 THE CRITICISM IS THE GOVERNMENT SHOULD HAVE OPENED THIS TO FIND
11:50AM 12 OUT THAT THEY HAD AN INOPERATIVE, INACCESSIBLE DATABASE PRIOR
11:51AM 13 TO THE DESTRUCTION OF THE LIS.

11:51AM 14 MS. SAHARIA: WELL, NO. AGAIN, THAT'S NOT PRECISELY
11:51AM 15 OUR -- MY POSITION.

11:51AM 16 IF THEY HAD ACTED PROMPTLY, WHETHER WITHIN FOUR DAYS OR
11:51AM 17 WHETHER WITHIN A WEEK, THERE WERE AVENUES AVAILABLE TO THE
11:51AM 18 GOVERNMENT TO USE THE COPY -- POTENTIALLY TO USE THE COPY IN
11:51AM 19 ITS POSSESSION OR TO GET THE ORIGINAL SERVER.

11:51AM 20 AND UNTIL WE HAVE AN EVIDENTIARY HEARING AND HEAR FROM THE
11:51AM 21 PEOPLE ON THE GROUND ABOUT WHAT THOSE AVENUES WOULD HAVE LED
11:51AM 22 TO, I DON'T THINK THAT WE CAN JUST TAKE FOR GRANTED THAT THESE
11:51AM 23 WERE DEAD ENDS AS MR. BOSTIC REPRESENTED THEM TO BE.

11:51AM 24 AGAIN, THEY COULD HAVE CONSULTED WITH THERANOS'S COUNSEL
11:51AM 25 ABOUT THE PASSWORD. APPARENTLY THEY DIDN'T DO THAT FOR A YEAR

11:51AM 1 AND A HALF, AND PERHAPS AT THAT POINT IN TIME THEY COULD HAVE
11:51AM 2 FOUND THE PASSWORD. PERHAPS THEY COULD -- I MEAN, THEY
11:51AM 3 CERTAINLY COULD HAVE OBTAINED THE PHYSICAL EQUIPMENT.

11:52AM 4 I THINK IT'S IMPORTANT TO KEEP IN MIND IN ADDITION THAT
11:52AM 5 THE ONLY REASON THAT WE'RE IN THIS POSITION AT ALL, THAT WE'RE
11:52AM 6 IN THIS POSITION OF THE FOUR-DAY GAP IS THAT THE GOVERNMENT
11:52AM 7 WAITED A YEAR AND A HALF FROM LEARNING ABOUT THE LIS DATABASE
11:52AM 8 TO EVEN BOTHER SUBPOENAING IT.

11:52AM 9 BY THE TIME THEY ASKED FOR THE DATABASE IN IT'S JUNE 4TH
11:52AM 10 SUBPOENA, THEY KNEW THE COMPANY WAS CLOSING SOON. AND IF THEY
11:52AM 11 HAD ACTED PROMPTLY IN OBTAINING OR COLLECTING EVIDENCE IN THE
11:52AM 12 FIRST PLACE, WE VERY WELL WOULD HAVE NEVER BEEN IN THIS
11:52AM 13 SITUATION.

11:52AM 14 THE COURT: BUT THERE WERE EARLIER SUBPOENAS AS
11:52AM 15 MR. BOSTIC IDENTIFIED. THERE WERE EARLIER SUBPOENAS. AND THE
11:52AM 16 SUBPOENAS IN THE REQUEST FOR PRODUCTION INDICATED DATABASE AND
11:52AM 17 ALL SOFTWARE NECESSARY TO ACCESS TO THAT. I READ THOSE IN THE
11:52AM 18 SUBPOENAS AS WELL AS --

11:52AM 19 MS. SAHARIA: THAT I DO NOT BELIEVE IS CORRECT,
11:52AM 20 YOUR HONOR. THE FIRST SUBPOENA FOR THE DATABASE AND THE
11:52AM 21 SOFTWARE NECESSARY TO OPERATE IT WAS JUNE 4TH. THEY HAD NEVER
11:53AM 22 BEFORE THAT DATE REQUESTED PRODUCTION OF THE DATABASE.

11:53AM 23 THEY HAD REQUESTED PRODUCTION OF INFORMATION FROM THE
11:53AM 24 DATABASE. THERANOS WOULD GENERATE EXCEL SPREADSHEETS OF
11:53AM 25 CERTAIN DATA IN THE DATABASE AND PRODUCE THAT TO THE GOVERNMENT

1 AS EXCEL SPREADSHEETS. BUT THE FIRST REQUEST FOR THE DATABASE
2 DIDN'T COME UNTIL JUNE 4TH, 2018.

3 WILMER HALE DID TELL THE GOVERNMENT WHAT SOFTWARE IT WOULD
4 NEED. THAT SOFTWARE BELONGED TO MICROSOFT, AND THERANOS DIDN'T
5 FEEL IT APPROPRIATE APPARENTLY, WHICH MAKES SENSE TO ME, TO
6 GIVE THE GOVERNMENT, IT WOULD PROBABLY WOULD BREACH A LICENSE,
7 TO GIVE THE GOVERNMENT A COPY OF THE PUBLICLY AVAILABLE
8 MICROSOFT SOFTWARE. AND SO IT TOLD THE GOVERNMENT WHAT
9 SOFTWARE TO GET, AND THERE'S NO EVIDENCE THAT IT DID.

10 JUST A FEW OTHER POINTS. ON THE BRADY ISSUE, THE
11 INFORMATION IN THE BRADY LETTER, AND THIS GOES TO OUR MOTION TO
12 COMPEL, IT IS BRADY INFORMATION. WHETHER OR NOT THE COURT
13 ULTIMATELY CONCLUDES THAT THE GOVERNMENT IS AT FAULT AND THAT
14 SUPPRESSION OR SOME OTHER SANCTION WOULD BE AN APPROPRIATE
15 REMEDY, THE FACT THAT THE GOVERNMENT RECEIVED THE MOST
16 COMPREHENSIVE COLLECTION OF TEST RESULT DATA AND MADE ALMOST NO
17 ATTEMPT TO EVEN OPEN IT FOR A YEAR AND A HALF IS HIGHLY
18 EXCULPATORY AND PROBATIVE EVIDENCE THAT THE GOVERNMENT DIDN'T
19 VIEW THIS AS VERY INCULPATORY OTHERWISE YOU WOULD THINK IT
20 WOULD TRY A LITTLE HARDER TO USE THIS DATA. THAT IS RELEVANT
21 EVIDENCE.

22 WE ARE ENTITLED TO MAKE A JUDGMENT CALL AS TO WHETHER WE
23 WANT TO PRESENT THAT EVIDENCE AT TRIAL, AND WE CAN'T DO THAT
24 WITHOUT THE ACTUAL DOCUMENTS AND IDENTITIES OF THE INVOLVED
25 INDIVIDUALS. SO THAT JUST GOES TO THE MOTION TO COMPEL.

1 JUST A FEW OTHER RESPONSES.

2 MR. BOSTIC POINTED OUT THAT THERE'S NO PREJUDICE HERE
3 BECAUSE TWO YEARS LATER IN 2020 THE GOVERNMENT PRODUCED A COPY
4 OF THE COPY TO MS. HOLMES.

5 OF COURSE MS. HOLMES DOES NOT HAVE ACCESS TO FBI COMPUTER
6 EXPERTS. SHE DOESN'T HAVE ACCESS TO THE PHYSICAL SERVERS
7 BECAUSE THE GOVERNMENT DIDN'T COLLECT THEM AND BY NOW THEY'VE
8 BEEN RETURNED TO THE LESSORS OR DESTROYED, NOR DID SHE HAVE
9 TIMELY ACCESS TO -- IN THE WAKE OF THIS PRODUCTION TO PEOPLE
10 WHO MIGHT HAVE HAD THE PASSWORD. AGAIN, THERE'S NO EVIDENCE
11 THAT MS. HOLMES HAD ANY KNOWLEDGE OF ANY OF THESE EVENTS, HAD
12 ANY KNOWLEDGE OF ANY PASSWORD ISSUE.

13 THE GOVERNMENT HAS AGAIN MADE SPECIOUS ASSERTIONS THAT SHE
14 MUST HAVE BEEN RESPONSIBLE FOR SUBPOENA COMPLIANCE. SHE WAS
15 NOT RESPONSIBLE FOR SUBPOENA COMPLIANCE.

16 WE RESPECTFULLY REQUEST THE OPPORTUNITY TO PRESENT TO THE
17 COURT IN CAMERA A STATEMENT TO THIS EFFECT SO THE COURT
18 UNDERSTANDS WHAT MS. HOLMES DID OR DID NOT OR HAVE ACCESS TO AT
19 THE RELEVANT TIME. WE THINK THAT THE INFORMATION IS
20 PRIVILEGED, BUT IT'S RELEVANT TO SOME OF THE COURT'S QUESTIONS,
21 AND WE WOULD RESPECT THE OPPORTUNITY TO PRESENT AN IN CAMERA
22 SUBMISSION TO THE COURT ON THAT ISSUE.

23 I'LL JUST CLOSE ON THE ISSUE OF PREJUDICE. IT IS -- THE
24 LACK OF ACCESS TO THE DATABASE IS PREJUDICIAL BOTH WITH RESPECT
25 TO INDIVIDUAL TEST RESULTS AND MORE GENERALLY.

1 WITH RESPECT TO THE INDIVIDUAL TEST RESULTS, THERE IS
2 SIGNIFICANT INFORMATION THAT WE CAN LEARN ABOUT THOSE
3 INDIVIDUAL TEST RESULTS FROM THE DATABASE. EVEN IF YOU CAN'T,
4 YOU KNOW, YOU CAN'T LOOK AT THE DATABASE FOR SURE AND KNOW IF
5 SOMEONE WAS ACTUALLY PREGNANT OR NOT, BUT AS I SAID, THERE'S
6 INFORMATION IN THE DATABASE THAT GOES TO WHETHER WHAT MIGHT
7 HAVE CAUSED AN INACCURATE TEST RESULT.

8 AND WE COULD TAKE THE MULTITUDE OF DATA IN THAT DATABASE
9 AND PUT THAT INDIVIDUAL RESULT IN CONTEXT, YOU KNOW, HOW MANY
10 OF THESE WERE OUT OF WHACK?

11 YOU KNOW, THE GOVERNMENT'S DOCTOR EXPERTS HAVE SAID THAT
12 THESE RESULTS IN MANY CASES WERE OBVIOUS ERRORS TO THEM.

13 WELL, HOW MANY OTHER OBVIOUS ERRORS ARE THERE IN THE
14 DATABASE? ARE THERE A LOT? ARE THERE NONE? IS THERE ONE OF,
15 YOU KNOW, HUNDREDS OF THOUSANDS OF SUCH RESULTS AND THIS IS
16 JUST ONE OF THEM? THAT WOULD BE VERY PROBATIVE, AND WE DON'T
17 HAVE ACCESS TO THAT.

18 AND IT'S NOT SPECULATION FOR US TO SAY THAT THERE IS
19 EXCULPATORY VALUE TO THE DATABASE, AND THAT'S THE LANGUAGE THAT
20 THE COURTS USED IN DETERMINING WHETHER TO SUPPRESS EVIDENCE,
21 WHETHER THERE IS POTENTIAL EXCULPATORY VALUE, AND WHETHER THE
22 GOVERNMENT KNEW THAT AT THE RELEVANT TIME.

23 AND THERE'S NO QUESTION THAT THERE ARE MANY, MANY, MANY
24 MILLIONS OF ACCURATE TEST RESULTS IN THAT DATABASE THAT SHOW
25 THAT THERANOS WAS GENERATING ACCURATE AND RELIABLE TEST RESULTS

11:58AM 1 ACROSS A VERY BROAD RANGE OF TESTS AND ALL OF THAT IS HIGHLY
11:58AM 2 EXCULPATORY BOTH ON THE QUESTION OF FALSITY BUT ALSO WITH
11:58AM 3 RESPECT TO MS. HOLMES'S INTENT.

11:58AM 4 SO WITH THAT WE URGE THE COURT TO SET THIS MOTION FOR A
11:58AM 5 HEARING AND SEPARATELY I URGE THE COURT TO GRANT OUR MOTION TO
11:58AM 6 COMPEL.

11:58AM 7 THE COURT: ALL RIGHT. THANK YOU VERY MUCH,
11:58AM 8 MS. SAHARIA.

11:58AM 9 MR. BOSTIC, MS. SAHARIA GETS THE LAST WORD, BUT IS THERE
11:58AM 10 ANYTHING YOU WANT TO SAY? AND IF THERE IS, I'LL GIVE
11:58AM 11 MS. SAHARIA THE LAST WORD.

11:58AM 12 MR. BOSTIC: THANK YOU, YOUR HONOR.

11:58AM 13 JUST ON THAT LAST POINT ABOUT THE PREJUDICE TO THE DEFENSE
11:58AM 14 AND THE EXCULPATORY NATURE OR ARGUABLE EXCULPATORY NATURE OF
11:58AM 15 THIS DATA. I WOULD REFER THE COURT TO THE FLYER DECISION AND
11:59AM 16 THE ROBERTSON DECISION.

11:59AM 17 SO FLYER REJECTED THAT DEFENDANT'S SUPPRESSION ARGUMENTS
11:59AM 18 PARTLY BECAUSE THAT DEFENDANT DIDN'T SHOW THAT THE LOSS OF
11:59AM 19 EVIDENCE PREJUDICED HIM. IN THAT CASE THE LOSS OF ELECTRONIC
11:59AM 20 INFORMATION MEANT THAT IT WAS ACTUALLY MORE DIFFICULT FOR THE
11:59AM 21 GOVERNMENT TO PROVE SUCCESSFUL DOWNLOADS OF THE INCRIMINATING
11:59AM 22 MATERIAL IN THAT CASE.

11:59AM 23 THE COURT: BUT THE GOVERNMENT DISMISSED THE ONE
11:59AM 24 COUNT THAT INVOLVED -- WAS INVOLVED IN THIS CASE IF I RECALL
11:59AM 25 CORRECTLY.

11:59AM 1 MR. BOSTIC: CORRECT, YOUR HONOR.

11:59AM 2 BUT THE DEFENDANT IN THAT CASE WANTED ADDITIONAL
11:59AM 3 SUPPRESSION THAT THE COURT DENIED ON THE BASIS THAT THERE WAS
11:59AM 4 AN INSUFFICIENT SHOWING THAT THE PREJUDICE WAS ACTUALLY APPLIED
11:59AM 5 TO THE DEFENDANT HIMSELF AS OPPOSED TO THE GOVERNMENT.

11:59AM 6 AND HERE WHEN WE'RE TALKING ABOUT CONTEXTUAL INFORMATION
11:59AM 7 SURROUNDING INDIVIDUAL PATIENT RESULTS, THERE'S EVERY REASON TO
11:59AM 8 BELIEVE THAT THE LACK OF THAT INFORMATION PUTS THE GOVERNMENT
11:59AM 9 AT A DISADVANTAGE ALSO SO THAT THE DEFENSE OBVIOUSLY CAN -- YOU
12:00PM 10 KNOW, IS AWARE OF THAT. BUT THIS IS NOT PREJUDICE UNIQUE TO
12:00PM 11 THE DEFENDANT. IT IS NOT THE KIND OF PREJUDICE THAT SUPPORTS A
12:00PM 12 FINDING OF SANCTIONS BEING WARRANTED UNDER LOUD HAWK.

12:00PM 13 ROBERTSON SIMILARLY DECLINES TO ISSUE A REMEDIAL JURY
12:00PM 14 INSTRUCTION UNDER LOUD HAWK PARTLY BECAUSE THAT COURT FOUND
12:00PM 15 THAT THE EXCULPATORY VALUE OF THE EVIDENCE IN THAT CASE WAS NOT
12:00PM 16 APPARENT.

12:00PM 17 SO HERE WHEN THE DEFENSE TALKS ABOUT HOW MANY ACCURATE
12:00PM 18 RESULTS THE LIS WOULD HAVE CONTAINED OR EVEN ASSUMES THAT IT
12:00PM 19 WOULD BE POSSIBLE TO IDENTIFY WHICH RESULTS WERE ACCURATE IN
12:00PM 20 THE LIS, THAT IS SPECULATION. IT'S THE KIND OF SPECULATION
12:00PM 21 THAT THE COURT CAN'T RELY ON IN AN ANALYSIS LIKE THIS.

12:00PM 22 AND IN ROBERTSON THE COURT HAD PREVIOUSLY FOUND THAT IT
12:00PM 23 WAS COMPLETELY SPECULATIVE WHETHER THE VIDEO THAT WAS LOST IN
12:00PM 24 THAT CASE WAS POTENTIALLY USEFUL TO THE DEFENSE AND THE SAME IS
12:00PM 25 TRUE HERE.

1 NOT ONLY HERE ARE WE FACING SPECULATION ABOUT THE NATURE
2 OF THE DATA IN THE LIS, SPECULATION WHICH IS CONTRARY TO WHAT
3 WITNESSES HAVE TOLD US AND WHAT OTHER DATA SHOWS, BUT WE'RE
4 ALSO FACING ANOTHER LAYER OF SPECULATION ABOUT WHETHER THAT
5 EVIDENCE WAS TRULY IN EXISTENCE AFTER THE ORIGINAL COPY OF THE
6 DATABASE WAS DISASSEMBLED IN AUGUST OF 2018. SO WE HAVE
7 MULTIPLE LAYERS OF SPECULATION HERE COMPOUNDING EACH OTHER.

8 NOT ONLY CAN THE DEFENSE NOT SHOW THAT THIS EVIDENCE WOULD
9 HAVE BEEN EXCULPATORY, IT CAN'T EVEN SHOW THAT THE EVIDENCE WAS
10 ACCESSIBLE OR EXTANT POST AUGUST 2018.

11 THE COURT: ALL RIGHT. THANK YOU.

12 MS. SAHARIA. AND THIS IS THE FINAL WORD, MS. SAHARIA.

13 MS. SAHARIA: FINAL WORD.

14 SO WITH RESPECT TO THE FLYER CASE, THE COURT HELD THERE
15 WAS NO EVIDENCE OF PREJUDICE TO THE DEFENDANT BECAUSE HE HAD
16 ADMITTED TO THE AGENTS THAT CAME TO SEIZE HIS COMPUTER THAT HE
17 HAD DOWNLOADED THE PORN, SO THE FACT THAT THE COMPUTER WAS NOT
18 AVAILABLE TO HIM WAS NOT EXCULPATORY. SO THAT'S NEITHER HERE
19 NOR THERE WITH RESPECT TO THIS CASE.

20 WITH RESPECT TO THE ROBERTSON CASE, THE COURT DID HOLD AN
21 EVIDENTIARY HEARING, AND IT WAS AFTER ALL OF THE EVIDENCE CAME
22 OUT AT THAT HEARING ABOUT WHAT THE VIDEO CAMERA SHOWED OR
23 DIDN'T SHOW AND WHICH WAY IT WAS POINTED AND THE FACT THAT IT
24 WAS ACTUALLY NOT EVEN -- THE VIEW OF THE CAR AT ISSUE WAS
25 OBSTRUCTED, ALL OF THAT EVIDENCE CAME OUT AT A HEARING AND ON

1 THE BASIS OF THAT EVIDENCE THE COURT CONCLUDED THAT THE
2 EXCULPATORY NATURE OF THE EVIDENCE WAS SPECULATIVE, AND,
3 THEREFORE, THERE WAS MINIMAL PREJUDICE.

4 I WILL NOTE THAT IN THAT CASE THE COURT ALSO RELIED ON THE
5 FACT THAT THE FAILURE TO PRESERVE THE EVIDENCE WAS DUE TO
6 ROUTINE OPERATION OF THE POSTAL SERVICE AND THAT THE
7 PROSECUTORS WERE NOT INVOLVED. THIS IS A VERY DIFFERENT
8 SITUATION THAN ROBERTSON.

9 WE ARE NOT SPECULATING. WE HAVE OFFERED THE COURT
10 EVIDENCE FROM WITNESSES INTERVIEWED BY THE GOVERNMENT THAT THE
11 DATABASE COULD HAVE THEN USED IF IT HAD BEEN PUT BACK TOGETHER
12 IN A TIMELY FASHION.

13 THE GOVERNMENT DOESN'T WANT TO BELIEVE THAT EVIDENCE, BUT
14 THAT'S EXACTLY WHY AN EVIDENTIARY HEARING IS REQUIRED SO THE
15 COURT CAN HEAR THAT EVIDENCE FIRSTHAND AND MAKE FINDINGS OF
16 FACT BASED ON THAT EVIDENCE.

17 THE GOVERNMENT WAS WELL AWARE THAT THIS WAS -- THIS WOULD
18 BE A COMPLEX DATABASE WHICH USED AND IT WAS PUT ON NOTICE OF
19 THAT FACT IN MAY. WE DON'T DISPUTE THAT THIS IS A COMPLEX
20 DATABASE. IT CERTAINLY WAS. THE GOVERNMENT HAD PLENTY OF
21 NOTICE OF THE STEPS THAT IT COULD HAVE TAKEN TO BE ABLE TO USE
22 DATABASE, AND IT DIDN'T TAKE ANY OF THOSE STEPS. THIS IS ALL
23 RELEVANT EVIDENCE THAT THE COURT SHOULD HEAR AT A HEARING.

24 THE COURT: ALL RIGHT. THANK YOU VERY MUCH. THANK
25 YOU.

12:03PM 1 AS I INDICATED AT THE OUTSET, I'M GOING TO REVIEW ALL OF
12:04PM 2 YOUR COMMENTS AND REVIEW, ONCE AGAIN, THE PAPERS AND THE COURT
12:04PM 3 WILL TAKE THE MOTION UNDER SUBMISSION, AND I'LL ISSUE AN ORDER
12:04PM 4 SHORTLY THAT WILL HAVE THE COURT'S FINDINGS AND RULING ON THE
12:04PM 5 MOTION AND ON THE REQUESTS FOR A HEARING AND OTHER INFORMATION.

12:04PM 6 ANYTHING FURTHER BEFORE WE CLOSE TODAY?

12:04PM 7 MS. SAHARIA: YOUR HONOR, I THINK MR. DOWNEY WOULD
12:04PM 8 LIKE TO ADDRESS A FEW -- ONE OR MORE ISSUES RELATING TO
12:04PM 9 PRETRIAL ISSUES.

12:04PM 10 THE COURT: OKAY.

12:04PM 11 MR. DOWNEY: JUST A HOUSEKEEPING QUESTION. I DON'T
12:04PM 12 THINK WE'RE SCHEDULED TO BE TOGETHER BEFORE THE QUESTIONNAIRE
12:04PM 13 WILL GO OUT. AND HAS THE COURT FINALIZED THAT? AND IS THERE
12:04PM 14 ANYTHING THAT THE COURT NEEDS FURTHER FROM THE PARTIES ON THAT?

12:04PM 15 THE COURT: I DO NOT NEED ANYTHING FURTHER FROM YOU.
12:04PM 16 AND YOU'LL GET THE COURT'S FINAL QUESTIONNAIRE SHORTLY.

12:04PM 17 MR. DOWNEY: GOOD. THANK YOU, YOUR HONOR.

12:04PM 18 AND THE OTHER QUESTION WAS JUST I KNOW YOUR HONOR HAD
12:04PM 19 MENTIONED THAT AT SOME TIME PRIOR TO THE 31ST WE MIGHT GET
12:04PM 20 TOGETHER.

12:04PM 21 I ASSUME THE COURT WILL SET THAT DATE IN THE FUTURE, BUT I
12:05PM 22 JUST WANTED TO ASK IF THE COURT WANTS TO SET IT NOW.

12:05PM 23 THE COURT: WELL, I'M HAPPY TO -- I DO THINK IT'S
12:05PM 24 IMPORTANT THAT WE DO GET TOGETHER, ALL OF US, AT SOME POINT IN
12:05PM 25 TIME, AND I WAS GOING TO LEAVE IT TO YOU TO SCHEDULE YOUR

12:05PM 1 SCHEDULES TO MEET AND CONFER AND SEE WHAT WORKS FOR ALL OF YOUR
12:05PM 2 TEAMS.

12:05PM 3 MR. DOWNEY: WE'LL DO THAT, YOUR HONOR.

12:05PM 4 THE COURT: BUT I'M HAPPY TO HAVE YOU IN HERE IN THE
12:05PM 5 COURT.

12:05PM 6 I CAN TELL YOU THAT, AS YOU PROBABLY READ, WE'RE STARTING
12:05PM 7 TO RELAX THINGS. OUR COURT HAS GIVEN US -- WE HAVE DECIDED TO
12:05PM 8 ALLOW EACH JUDGE THE DISCRETION AS TO WHETHER OR NOT TO TAKE
12:05PM 9 THE PLEXIGLASS DOWN THAT'S IN THE COURTROOM, AND YOU'VE HEARD
12:05PM 10 ME SPEAK ABOUT MY FONDNESS OF THE PLEXIGLASS IN THE COURTROOM.

12:05PM 11 I HAVEN'T ASKED IT TO BE REMOVED JUST YET. IN THE SPIRIT
12:05PM 12 OF FULL DISCLOSURE, I'M CONSULTING WITH MY STAFF ALSO TO SEE
12:06PM 13 WHAT THEIR COMFORT LEVEL IS AS WELL BEFORE I MAKE ANY FINAL
12:06PM 14 DECISIONS, AND I'M HAPPY TO HEAR FROM YOU AS WELL ABOUT THAT,
12:06PM 15 TOO, THAT IS, BOTH SIDES, ABOUT YOUR CONCERNS, IF ANY, ABOUT
12:06PM 16 WHETHER OR NOT PLEXIGLASS SHOULD STAY IN PLACE AND WHAT YOUR
12:06PM 17 THOUGHTS ARE, AND, IF SO, IN WHAT CAPACITY. THAT MIGHT BENEFIT
12:06PM 18 YOU AND YOUR WITNESSES AND ALL OF THE PARTIES.

12:06PM 19 SO YOU CAN LET ME KNOW THAT, TOO.

12:06PM 20 BUT, YES, I'D LIKE YOU TO MEET AND CONFER AND WORK WITH
12:06PM 21 MS. KRATZMANN AND SEE IF WE CAN GET AN AGREEABLE DATE WHEN WE
12:06PM 22 CAN ALL GET TOGETHER.

12:06PM 23 MR. DOWNEY: FAIR ENOUGH, YOUR HONOR. UNDERSTOOD,
12:06PM 24 YOUR HONOR.

12:06PM 25 THE COURT: OKAY. GREAT. THANK YOU.

1 THEN LET ME JUST EXTEND OUR BEST WISHES TO EVERYONE IN
2 FUTURE ENDEAVORS, AND WE HOPE THE BEST AND EXTEND OUR GOOD WILL
3 TO ALL OF YOU, AND WE LOOK FORWARD TO SEEING YOU AGAIN ALL
4 HEALTHY, AND I LOOK FORWARD TO HAVING YOU ALL IN THE COURTROOM
5 AGAIN.

6 SO BEST WISHES. THANK YOU.

7 MS. SAHARIA: THANK YOU, YOUR HONOR.

8 MR. BOSTIC: THANKS VERY MUCH.

9 MR. WADE: THANK YOU, YOUR HONOR.

10 THE CLERK: COURT IS ADJOURNED. THIS WEBINAR SHALL
11 TERMINATE.

12 (COURT CONCLUDED AT 12:07 P.M.)
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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

A handwritten signature in black ink that reads "Irene Rodriguez". The signature is written in a cursive, flowing style with a large, decorative flourish at the end of the last name.

IRENE RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074

DATED: JULY 9, 2021